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IN THE SUPREME COURT OF THE UNITED STATES

1986 TERM

WILLIAM JANKLOW, Petitioner,

v.

NEWSWEEK, INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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July 14, 1986

QUESTIONS PRESENTED

Under the law of defamation and the First Amendment, the lower courts have generally held that statements of "opinion" may not form the basis for an action in libel. In this case, petitioner brought an action against Newsweek magazine for publishing an article which suggests that the petitioner, while serving as Attorney General for the State of South Dakota, retaliated against an individual who had accused him of rape by using his position as Attorney General to bring criminal charges against the individual. The article failed to inform the reader that the petitioner brought the criminal charges against the individual a year before the individual accused the petitioner of rape.

The questions presented are:

(1) Whether the defamatory suggestions contained in the article are statements of fact, or protected opinions.

(2) If they are opinion, whether defamatory opinions which are based upon falsely stated facts, or upon implications created by omissions of crucial

facts, are protected by the First Amendment.

(3) Whether defamatory opinions not actually held by the publisher, and made with actual malice, are protected by the First Amendment.

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IN THE SUPREME COURT OF THE UNITED STATES

FALL TERM 1985

WILLIAM JANKLOW, Petitioner

vs.

NEWSWEEK, INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, William Janklow, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, en banc, entered in the above-entitled proceeding on April 10, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, en banc, is reported at 788 F.2d 1300, and is reprinted in the appendix hereto, p. A-61 infra.

The opinion of the panel of the United States Court of Appeals for the Eighth Circuit is reported at 759 F.2d 644, and is reprinted in the appendix hereto, p. A-19, infra.

The opinion of the United States District Court for the District of South Dakota has not been reported and is reprinted in the appendix hereto, p. A-7, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 10, 1986. On July 8, 1986, Justice Blackmun ordered that the time for filing this petition for writ of certiorari be extended to and including July 14, 1986. The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment One.

STATEMENT OF THE CASE

William Janklow, the Governor of South Dakota, filed this defamation action against Newsweek based on an article published in that magazine's February 21, 1983, issue relating to American Indian activist, Dennis Banks. Entitled, "Dennis Banks's Last Stand," the article purports to give a history of the relationship between Banks, who fled South Dakota in 1975 after his conviction on two felony counts, and Janklow, who as special prosecutor, and later as Attorney General, prosecuted Banks. The defamatory implication of the article, as so construed by the District Court as well as the Eighth Circuit Court of Appeals, is that Janklow misused his office as Attorney General of South Dakota in order to gain his own personal revenge upon Banks. Specifically, the article insinuates that Janklow commenced a criminal prosecution against Banks in retaliation for Banks' own earlier attempts to bring

Janklow to justice in tribal court for assaulting and raping a fifteen year old Indian girl.[1]

Contrary to the clear implication of the article, however, members of the Newsweek staff knew at the time of publication that Janklow's indictment of Banks actually occurred one year prior to the time that Banks raised his rape accusations against Janklow. In fact, in his interview prior to publication of the article, Banks himself specifically told Newsweek reporter Martin Kasindorf that one of his motives in raising the rape charges was to "derail" the man who was prosecuting him on several felony charges. (Kasindorf recorded interview, p. 2; Clerks record 286-334).

When Donna Foote, the other principle Newsweek reporter working on this article, later learned what reporter Kasindorf had known all along, she expressed surprise and shock, and herself characteriz-

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[1] As noted in the en banc opinion below, those charges of assault and rape are now acknowledged to be false. (See En Banc memorandum opinion, at App. 62)

ed the final article's depiction of the "Janklow vendetta" as an "outrageous" and "reckless" distortion of the truth. (See Clerk's record, p. 232; See also Judge Bowman's dissent to en banc decision, App. 90). In fact, Donna Foote immediately drafted a letter of protest to the Newsweek editors complaining about the form of the final draft of the article that she herself had co-authored. That letter contained the following remarks:

> "When I approached Governor Janklow for an interview on the Dennis Banks story, he politely declined. Janklow simply wasn't interested in participating in his own character assassination. . . . As it turned out, Janklow was right. We did do a job on him and we also riddled it with errors."
> (Foote interview No. 2., p. 4, and Foote deposition, p. 83)

Thereafter, William Janklow brought this suit against Newsweek. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 because of the diversity of citizenship. The Federal District Court granted Newsweek's motion for summary judgment,

stating that although the Court itself was personally "outraged" at the unfairness of the article (App.-16), the "sting" of the publication could be called opinion, and as such, is protected by the First Amendment. (See District Ct. Opinion, App.-14).

On appeal, a panel of the United States Court of Appeals for the Eighth Circuit reversed, holding:

> "Because we conclude that the meaning that can be drawn from the Newsweek article — that Janklow did not commence prosecuting Banks until after Banks attempted to bring him to justice for the alleged rape of an Indian girl — is factual, we reverse. . ." (See panel opinion, App. 45)

Finally, the Eighth Circuit Court of Appeals, sitting en banc, reversed the panel decision, and affirmed the District Court, labeling the article slanted and unfair, but nonetheless merely an expression of opinion, and dismissing plaintiff's action. (See en banc - opinion, App. 80).

REASONS FOR GRANTING THE WRIT

This case deals with the question of the First

Amendments "opinion privilege" as a defense to defamation actions. This notion was born out of a single line of dicta from the Court's decision in Gertz vs Welch, 418 U.S. 323 (1974), and has thereafter been interpreted by the lower courts as an "absolute constitutional privilege." The Gertz case, however, had nothing to do with the question of the opinion privilege, and neither has the Court ever on any occasion since given the lower courts any guidance insofar as actually identifying a protected opinion. The results have been conflicting approaches. The only clear consensus of the lower courts is that the issue is one which badly needs the attention of the Supreme Court.

Part I of this petition will outline the reasons why a direct ruling from this Court on the "opinion privilege" issue is overdue. Part II is an overview of the fractured and conflicting results that have developed among the lower courts as a result of the lack of any Supreme Court attention to this problem. Part III will discuss the fact that the ruling below is in conflict with rulings of

other federal circuits, as well as being in conflict with the direct language of this court itself in one of the Court's few references to the scope of the opinion privilege. Part III will also try to illustrate why this particular case will make a particularly good vehicle for the Court to analyze the scope of the opinion privilege.

I.

A DIRECT RULING FROM THIS COURT ON THE HOTLY DEBATED "OPINION PRIVILEGE" TO DEFAMATION ACTIONS IS LONG OVERDUE.

Over twenty years ago, in Garrison vs Louisiana, 379 U.S. 64 (1964), this Court faced a potential fact-opinion issue when the Defendant, a local district attorney, accused several judges of inefficiency, laziness, and obstruction of his efforts to enforce vice laws. Id. at 65. The Court, however, reversed Garrison on other grounds and expressly reserved the fact-opinion issue for resolution on another day. Id. at 76 n. 10.

Then, in Gertz vs Welch, 418 U.S. 323 (1974), a

case which did not even remotely concern the question, Justice Powell penned the dicta which has been seized upon by the lower courts and has formed the sole basis for what many now view as an absolute Constitutional privilege against defamation actions:

> "Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." Gertz, 418 U.S. at 339-40, 94 S. Ct. at 3007.

As noted by Judge Friendly in Cianci vs New York Times Pub. Co., 639 F.2d 54, 61 (2d Cir. 1980), the above cited dicta from Gertz has now become the "opening salvo" of every defendant seeking protection from a defamation action on the grounds of opinion. The lower courts have indeed leapt upon this piece of dicta and have created a privilege which now, in its very real effect, threatens to swallow the law of defamation and the important social values which that law serves. (See Note, Fact and Opinion after Gertz vs

Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers Law Rev. 81, and cases cited therein.)

All of this has occurred despite the strong indications that the Court, when writing the Gertz decision, may not have contemplated that its words would create any absolute privilege. Mr. Justice Rehnquist has twice indicated his strong sentiments regarding the Gertz dicta:

> "At the time I joined the opinion in Gertz, supra, I regarded this statement as an exposition of the classical views of Thomas Jefferson and Oliver Wendell Holmes that there was no such thing as a false "idea" in the political sense,. . . But it is apparent that lower courts have seized upon the word "opinion". . . to solve with a meat axe a very subtle and difficult question, totally oblivious 'of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1239 (1976)"

Ollman vs Evans, 105 S. Ct. 2662 (1985) (on petition for writ of certiorari, Rehnquist J., dissenting, joined by

Chief Justice Burger).[2]

Therefore, among the first reasons immediately apparent for the granting of a writ in this case is so this Court may, for the first time, address what many lower courts now view as an absolute Constitutional privilege under the First Amendment, and which probably arises as an issue in a majority of defamation cases.

II.

LOWER COURTS ACROSS THE NATION ARE CONFUSED AND DIVIDED IN THEIR APPLICATION OF THE "OPINION" PRIVILEGE.

Another compelling reason for which the writ should be issued in this case is the absolute lack of clarity and direction which typifies the decisions of the lower courts with regard to the recurring issue of the

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[2](See also Mr. Justice Rehnquist's dissenting opinion, joined by Justice White in Miskovsky vs Oklahoma Publishing Co., 459 U.S. 923, 103 S. Ct. 235 (1982) (on petition for certiorari).

opinion privilege. Judge Bowman, who authored the panel decision and wrote a dissent to the en banc opinion below, accurately described the vague standards for distinguishing fact-opinion questions available under existing formulas when he noted that:

> "Beauty is in the eye of the beholder, and it would appear that the result to be obtained through application of the Ollman factors [for distinguishing fact from opinion] is in the eye of the judge. Clearly those factors do not yield predictability. . ." (See App. 92).

Judge Bowman's complaints as to the vague and confused nature of existing definitions of protected opinion are definitely not unique among appellate courts. Lower courts across the country have indeed quite literally cried out to this Court for guidance. Consider the First Circuit's remarks in Bose Corp. vs Consumers Union of U.S., Inc., 692 F.2d 189, 193-94 (1st. Cir. 1982), to the effect that:

> "The determination of whether a statement is one of opinion or fact, however, is difficult to make and perhaps unreliable as a basis for decision."

Similarily, the Eleventh Circuit Court of Appeals, sitting in Keller vs Miami Herald Publishing Co., 778 F.2d 711 (11th Cir. 1985), commented that:

> "Although fashioning a rule to distinguish between statements of fact and opinion may seem intuitively simple in abstract, the courts, without Supreme Court guidance, have struggled to formulate a test that is workable in actual practice." Id. at 717.

In Ollman vs Evans, 750 F.2d 970 (D.C. Cir. 1984) the Court of Appeals for the District of Columbia devoted no less than sixty-eight pages and seven separate opinions to the "simple" resolution of whether derogatory remarks published about a college professor amounted to fact or opinion. The only issue squarely agreed upon by the eleven different members of the D.C. Circuit in their voluminous discussion is that the nation's lower courts are sorely in need of help

from the Supreme Court on this particular question[3].

The constantly evident lack of Supreme Court guidance on this issue has led, not surprisingly, to a plethora of differing approaches to the problem. Some courts have applied a so called "Reader-oriented approach," which focuses upon whether the publication will strike the average reader as either fact or opinion.[4]

Other courts have used a "truth or falsity", or "verifiability" test, reasoning that if a particular assertion is capable of being proven true or false, it is

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[3] On numerous occasions throughout the majority, concurring, and dissenting opinions in Ollman, the Judges of the D.C. Circuit comment on the almost tota lack of Supreme Court guidance on this important issue. Id, at 975, 977, 978, 1017, 1020.

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[4] Pring vs Penthouse Intern., Ltd., 695 F.2d 438, 442 (10th Cir. 1982); A. S. Abell Co. vs Kirby, 227 MD 267, 274, 176 A.2d 340, 343 (1961); Mashburn vs Collin., 355 So. 2d 879, 885 (La. 1977); Economy Carpets Mfrs. and Distributing. vs Better Business Bureau, 361 So.2d 234. 240 (La. Ct. App. 1978), cert. denied, 440 U.S. 915 (1979).

therefore factual.[5]

Another group of courts would rely upon an analysis of the context in which the statements were made, with variations as to whether the scrutiny should focus upon the context of the specific publication itself, or more broadly, the atmosphere and circumstances surrounding the publication.[6]

Still other courts have preferred to avoid ruling on the issue altogether as a matter of law, and have instead, in close cases, simply submitted the question

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[5] Hotchner vs Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977), cert. denied sub. nom., Hotchner vs Doubleday and Co., 434 U.S. 834 (1977); Buckley vs Littel, 539 F.2d 882, 894 (2d Cir. 1976), cert denied, 429 U.S. 1062 (1977); Goodrich vs Waterbury Republicans -American, Inc., 448 A.2d 1317, 1319 (Conn. 1982).

[6] Information Control Corp. vs Genesis One Corp. Computer Corp., 611 F.2d 781 (9th Cir. 1980); Church of Scientology vs Cazares, 638 F.2d 1272, 1288-89 (5th 1981); Myers vs Boston Magazine Co., 308 Mass. 336, 341, 403 N.E.2d 376, 379 (1980); Gregory vs McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552, P.2d 425, 428, 131 Cal. Rptr. 641, 644 (1976).

for determination by the jury.[7]

The United States Court of Appeals for the Second Circuit has itself held that where opinions and fact are so "inextricably interwoven," there is no need to untangle the two, since a reasonable reader would not — indeed, could not — do so. Cianci vs New York Times Publishing Co., 639 F.2d 54 (2nd Cir. 1980).

Finally, at least one court has simply held that "the distinction between a fact statement and an opinion or comment is so tenuous in most instances, that any attempt to distinguish between the two will lead to needless confusion" Pearson vs Fairbanks Publishing Co., 413 P.2d 711 at 714 (Alaska 1966).

Complaints with the unsatisfactory and unreliable standards currently available with respect to the fact-opinion dichotomy have occupied countless pages of

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[7] See Good Government Group vs Superior Court, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978); Kutz vs Independant Pub. Co., Inc., 97 NM 243, 638 P.2d 1088 (NM 1981); Nevada Indep. Broadcasting Corp. vs Allen, 664 P.2d 337 (Nev. 1983).

the reporter systems, law reviews, and scholarly treatises. See Note, The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright Line Rule, 72 Georgetown L. Rev. 1817 (1984);[8]

Certiorari should be granted in this case because utilization of the fact-opinion dicta mentioned in Gertz has lead to nothing but confusion, lack of clarity, and to result-oriented decision-making which often defies both logic and principle, and which threatens the very foundation of the law of defamation. An absolute Constitutional privilege should not be based on such vague and entirely unreliable qualities as those found in this area of the case law, and demands the clarification of this Court's authoritative voice.

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[8] See also, Carmen, Hutchinson vs Proximire and the Neglected Fair Comment Defense: An Alternative to "Actual Malice", 30 De Paul L. Rev. 1, 13 (1980) (stating that a review of cases reveals an "uncomfortable legacy of judicial confusion,"); W. Prosser, Law of Torts, 820 (4th Ed. 1971); Titus, Statement of Fact Versus Statement of Opinion - Dispute in Fair Comment, 15 Vand. L. Rev. 1203 (1962).

III.

THE RULING OF THE COURT BELOW CONFLICTS WITH RULINGS SET FORTH BY OTHER FEDERAL CIRCUITS — AND IS IN CONFLICT WITH THE LANGUAGE OF THIS COURT ITSELF, WITH REGARD TO THE OPINION PRIVILEGE

Petitioner would suggest that the relatively straight-forward facts set forth by this case present the Court with an outstanding vehicle with which to tour the outlaying boundaries of the opinion privilege. This is so for several reasons.

(1) An Opinion Based on Falsely Stated Facts Deserves No Protection.

First, even if the "vendetta" thesis of the article can be somehow characterized as opinion, it is evident that such an "opinion" is, in this case, founded and substantiated for the reader on falsely stated facts (i.e. . . . that Janklow's prosecution of Banks followed, or was precipitated by Banks' allegations of rape against Janklow in 1974). It is contrary to good sense to

assume that a speaker may strike blows at the subject of his remarks, even in the form of opinions, and then seek to convince his listeners that his derogatory opinions are valid by intentionally feeding them false facts in apparent support thereof. Despite the ruling of the Eighth Circuit below, other Federal Circuit have recognized this principle and have indeed held that opinions based on falsely stated facts are not protected.[9]

This very principle is expounded upon by Harper and James in their scholarly work, The Law of Torts:

> If the facts are accurately stated, an opinion based thereon will be understood as such and taken for what it is worth. . . But if the facts are misstated, the subject of his remarks is at the writer's mercy, and a defamatory opinion, unless properly labeled, may have the effect of fact." 1 Harper and James, The Law of Torts, § 5.28 at 458 (1954).

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[9] See Davis vs Ross, 754 F.2d 80 (2nd Cir. 1985); 754 F.2d 80 (2d Cir. 1985); See also, Kapiloff vs Dunn, 343 A.2d 251 (Md. App. 1975); Renwick vs News and Observer Pub. Co., 304 SE2d 593 (N.C. App. 1983) (reversed on other grounds 312 SE2d 405 [N.C. 1984]) McManus vs Doubleday and Co., Inc., 513 F. Supp. 1383 (D.C., N.Y. 1981).

2. The Defamatory Theme of the Article Here is Created by Crucial Omissions of Fact Known to the Publisher.

Newsweek contends, and the majority below agreed, that it has not falsified the chronology of events, but merely omitted certain materials that, had they been included, may have portrayed Janklow in a better light (i.e. . . once againg, the fact that Janklow's indictment and prosecution of Banks preceded the rape allegations).

Accepting this proposition for the moment as true, the case would then pose yet another classical opportunity for the Court to address the boundaries of the opinion privilege.

Is it reasonable to allow a publisher to convey a derogatory "opinion" about his victim in a national news magazine by listing a number of facts that seemingly add up to the desired conclusion (that Janklow's

indictment of Banks was motivated by a desire for revenge), yet knowingly omit one crucial fact that, if included, would alter the entire meaning to be understood by the reader? The Eighth Circuit Court below held that this is in fact acceptable.

> "We can agree that this story would have been fairer to Janklow and more informative to the reader if the chronology of the rape charge against Janklow and the riot prosecution against Banks had been more fully explained. . . [however] . . . Accounts of past events are always selective, and under the First Amendment the decision of what to select must always be left to writers and editors. It is not the business of government. (Emphasis added.) (App. 80)

This holding, as set forth by the Eighth Circuit in this case is, however, directly at odds with the holdings of the Fifth Circuit Court of Appeals in Golden Bear Distr. Systems vs Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983).

> "Although the truth of an alleged libel may be proven as a complete defense, it is not a defense to show that a statement contained in a publication, if taken alone, is literally true, when other facts are omitted

> which plainly refute the false impression of the partial statement. A statement is not true or even substantially true if, by implication, an entirely untrue impression is made by omission of part of the facts." (emphasis added) Id. at 949. Citing Express Publishing Co. vs Gonzales, 350 S.W.2d 589, 592 (Tex App. 1961).[10]

Petitioner Janklow would submit that this conflicting view between the Federal Circuit Courts of Appeals, as to omissions of material fact (i.e. . . that Janklow had already been prosecuting Banks for some time when the rape allegations were made by Banks) would itself justify issuance of the writ in this case.

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[10] This same principle was described in yet another way by the Second Circuit Court of Appeals in Afro. American Publishing Co. vs Jaffe, 366 F.2d 649 (2nd Cir. en banc 1966):

> "[P]artial truths are not necessarily even mitigating in this branch of the law, for the defamer may be all the more successful when he baits the hook with truth." Id. at 655.

3. The Decision of the Lower Court is in Conflict With a Prior Decision of this Court, Because the "Opinions" Set Forth by this Article were Published with Actual Malice.

One final matter deserves note here. The evidence is uncontroverted that Newsweek knew the true chronology of events when it printed this article. The evidence is clear that Newsweek knew that it was Banks who had an ulterior motive for pressing charges against Janklow, rather than vice-versa as presented in the article. (Banks himself candidly admitted this fact to Newsweek reporter Kasindorf). In one of its few references to the opinion privilege, this Court has itself indicated that the defense of opinion or fair comment is actually defeasible upon a showing of actual malice.

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest mistakes of fact, it follows that a defense of fair comment must be afforded for honest expressions of opinion based on privileged, as well as true, statements of fact. Both defenses are defeasible if the public official proves actual malice, as was not done here." (emphasis added) Sullivan

vs New York Times, 376 U.S. 254, 292 n. 30 (1964)"

In the present case, the issue of malice was never actually ruled upon by the lower courts, and thus, dismissal was premature.

At the very least, the knowledge of falsity in this case is clearly sufficient to raise a serious issue, which, under Sullivan, would amount to a complete defeasance of any opinion privilege. Sullivan, supra. It is only reasonable, as stated in Sullivan, that even opinions are not protected under the circumstances of this case, and such circumstances provide yet one more reason why certiorari should issue here.

" This remark made by the Court in the landmark case of Sullivan vs New York Times, is indeed supported by the views of scholarly commentators as well. See, R. Sack, Libel, Slander, and Related Problems, 175-76 (1980) (the privilege of fair comment may be lost when an opinion is not genuinely believed — a drama critic who pans a show because it has been produced by his hated brother-in-law. . ."):

CONCLUSION

For various reasons asserted above, petitioner respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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APPENDICES

A-1

Dennis Banks's Last Stand

Banks in North Dakota (1974): Still battling a man he calls 'Custer reborn'

Just hours after conservative Republican George Deukmejian was sworn in as California's new governor on Jan. 3, police Sgt. Roy Ennis appeared at the front door of a house in Dixon, Calif., with a South Dakota fugutive warrant for the arrest of Dennis Banks. He was too late. Banks, the 52-year-old leader of the

American Indian Movement (AIM), had fled to an Onondaga Indian reservation in upstate New York. Once again, he had escaped the clutches of his nemesis, South Dakota Gov. William Janklow, who has pursued him implacably for nearly nine years. Seated on a narrow bed in an Onondaga family's home, where he has taken refuge, Banks recently vowed that he would never surrender to Janklow. "He's anti-Indian — Custer reborn," Banks told NEWSWEEK national correspondent Martin Kasindorf.

Banks's escape was the latest chapter in a bizarre test of wills and wiles that began in the early 1970s. At that time, AIM was escalating its efforts to improve the lot of native Americans. In 1972 Banks confronted Julie Nixon Eisenhower at the Republican convention in Miami with a list of demands for Indian housing and education. A few months later, he was on hand when a band of Indians occupied the Bureau of Indian Affairs (BIA) in Washington. In 1973 he was involved in a riot at the Custer, S.D., courthouse during which several

policemen were injured. And he helped lead the 71-day takeover of Wounded Knee, S.D.

Along the way, Banks made a dangerous enemy — William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow — who had won his election despite the messy publicity — was prosecuting Banks. And his case — based on the 1973 Custer riot — was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

The FBI traced Banks to San Francisco in 1976, and Janklow swore out a state fugitive warrant. But Jane Fonda, Marlon Brando and a host of other liberals led a campaign to save him. And Banks's legal representative, activist attorney William Kunstler, collected 1.4 million signatures in a worldwide petition drive to persuade former Gov. Jerry Brown not to comply with the extradition request.

As a compromise, Brown's legal-affairs director offered to jail the fugitive in California for up to 15 years. Banks quickly agreed, but it was not enough for Janklow. "All the little people who followed Dennis Banks that day in Custer faced justice," Janklow says. "One of the key things people like Dennis Banks complain about is the dual standards of justice in this country — and if we allow him to go free because he has friends like Jerry Brown and Marlon Brando, we would be playing right into the accusations of duality." Determined that Banks face justice too, he took his case to the California Supreme Court, which ruled that the mat-

ter was entirely Brown's decision. Brown in turn refused extradition after his legal staff warned that Banks's life might be in danger if he returned to South Dakota.

A New Life: Safe at last, Banks began a new life as a law-abiding citizen. He taught courses at Stanford, became chancellor of tiny Deganawidah-Quetzalcoatl University in Davis and he became a favorite on the establishment lecture circuit. Janklow, meanwhile, was elected governor of South Dakota in 1978 — and picked a public battle with Governor Brown over extradition. At one point, he spread a story that he had offered "prison or California" to 93 convicted felons in his state. "We kind of feel there's a beacon in California," Janklow said. "'Give us your felons, your pickpockets, your crooked masses yearning to be free'."

The beacon dimmed for Banks last November. Throughout the California gubernatorial race, Deukmejian vowed that if elected he would not continue to shelter Banks. When Deukmejian pulled off an upset victory, Banks's supporters were desperate but still

hopeful. They appealed to his Armenian ancestry, hoping to arouse sympathy for oppressed minorities. Their answer came with Sergeant Ennis's warrant.

So far, New York Gov. Mario Cuomo has said nothing. But as soon as Janklow presents Cuomo with an extradition request, Kunstler hopes to work out a deal, either for asylum in New York or a quick return to South Dakota for sentencing and then back to New York to serve a short term. The Onondagas have told Banks that they will try to protect him, but "rather than risk [their] blood," he says, "I would leave." For where? One option is Central America. Another might be to accept Brando's offer of sanctuary on his secluded private island near Tahiti. But Banks has turned that down. "Even though I'm hounded from one end of this country to the other," he says, "I will never abandon it completely."

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

WILLIAM JANKLOW,

Plaintiff,

-vs-

NEWSWEEK INC.,

Defendant.

CIV 83-4023

APPEARANCES:

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MEMORANDUM OPINION

Plaintiff William Janklow commenced this libel action against defendant Newsweek, Inc. alleging that an article entitled "Dennis Banks's Last Stand" which appeared in the February 21, 1983 issue of Newsweek defamed him.

Defendant has moved for summary judgment. Both parties have submitted considerable material and extensive briefs on the subject and the motion was heard on January 9, 1984.

BACKGROUND

This action arises out of an article focusing on the past and present activities of Dennis Banks, an Indian activist and fugitive from justice. The article contains a paragraph describing the cause of an alleged dispute between Banks and plaintiff. This paragraph, which forms the primary basis for the present suit, reads

> Along the way, Banks made a dangerous enemy - William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow - who had won his election despite the messy publicity -was prosecuting Banks. And his case - based on the 1973 Custer riot - was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

Newsweek argues that its motion for summary judgment should be granted because statements in the article concerning plaintiff are substantially true, and that any claimed inaccuracies do not relate to the sting or gist of the article.

LEGAL PRINCIPLES INVOLVED

The Eighth Circuit announced the standard to follow when considering summary judgment motions involving libel actions in Brown v. Herald Co., Inc., 698 F.2d 949 (8th Cir. 1983). There the court stated:

> A libel action may properly be decided on a motion for summary judgment. Treutler v. Meredith Corp., 455 F. 2d 255, 257 (8th Cir. 1972); Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 865 (5th Cir. 1970). In deciding such a motion, the trial court must determine whether there is any genuine issue in dispute, and the record must be viewed in the light most favorable to the nonmoving party. However, once the party seeking summary judgment makes a convincing showing that genuine issues of material fact are lacking, "the adversary is required to adequately demonstrate by receivable facts that a real, not a formal, controversy exists," McCormick v. Ross, 506 F.2d 1205, 1208 (8th Cir. 1974) (per curiam).

> When a plaintiff in a libel suit is a public figure, he or she must allege and prove with "convincing clarity" that the libelous statement was made by a defendant with "actual malice." Monitor Patriot Co. v. Roy, 401 U.S. 265, 270, 91 S. Ct. 621, 624, 28 L. Ed.2d 35 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86, 84 S. Ct. 710, 728-729, 11 L. Ed.2d 686 (1964).

698 F.2d at 951.

The Eighth Circuit also held in Schuster v. U.S. News & World Report, Inc., 602 F.2d 850 (8th Cir. 1979):

> [T]he Supreme Court has recognized that the cost of defending a protracted lawsuit can chill first amendment rights. (citations omitted.) The courts must keep this harmful effect in mind and grant summary judgment in favor of libel defendants where, on close analysis, it is appropriate under the Federal Rules of Civil Procedure. (citations omitted.) 602 F.2d at 855.

This approach has been criticized in SUMMARY JUDGMENT IN DEFAMATION ACTIONS: A THREAT TO THE SUBSTANTIVE RIGHTS OF PUBLIC FIGURE PLAINTIFFS, 3 Cardozo Law Review 105 (1981).

Whether or not a news article is libelous and ac-

tionable rests on state law. Schuster, supra. at 853. The South Dakota Legislature has defined libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation. S.D.C.L.§20-11-3.

HOLDING

Upon examination of the record herein, I conclude there is no genuine issue as to any material fact herein. Viewing those facts in a light most favorable to the plaintiff, I conclude that the defendant is entitled to judgment herein as a matter of law for the reasons hereinafter stated. Defendant's motion must therefore be granted. Rule 56.

DISCUSSION

The basic facts reported by defendant did occur: there was a rape claim made against the plaintiff which

was investigated in 1967 and which received additional publicity at the time he ran for Attorney General of South Dakota in 1974 and again when he was nominated for a position on the national Board of Directors of Legal Services Corporation in 1975; Federal officials did find insufficient evidence to prosecute; and that plaintiff was barred by tribal court action from practicing law on the Rosebud reservation at the instigation of Banks.

We can start with the proposition that any news report that falsely charges a person with rape is libelous. Also, a news article that truthfully reports that a rape claim was made against a person in the past may be libelous under certain circumstances. Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980).

Plaintiff argues that the legal principles set out in Cianci v. New Times Publishing Co., supra, require submitting the issue of whether or not the article was libelous to a jury. While Cianci also involved an article

in which an old rape claim was reported, the similarity ends there. In Cianci, the paper did not simply report the old charges but espoused or concurred in them.

The article in question is not susceptible to such an inference. The tenor of the article is not that plaintiff is a rapist in defendant's opinion. The inference that may reasonably be drawn is that plaintiff is pursuing Banks so vigorously because Banks instigated the tribal court action based on the old rape claim. The issue is whether expression of such an opinion conc-stitutes libel, and I conclude it does not.

In addition, plaintiff claims that he was defamed by the omission of favorable facts consisting of the results of the 1975 investigation.

In Reliance Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) plaintiff made a similar claim that it was defamed by "selective omissions" of favorable facts. The court responded:

> We do not accept plaintiff's contention. Obviously the author of an article will have to choose which facts to include and which to omit. It is impossible to print all of the facts on which an opinion or belief is based, especially when an article comprises a critical analysis of a company's accounting practices. Were the courts or criticized corporations to be allowed to dictate the contents of such articles, censorship would have won out over free speech and the right to dissent. See Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed.2d 45 (1971); Hutchinson v. Proxmire, 431 F. Supp. 1311 (W.D. Wis. 1977).

442 F. Supp. at 1352. I find the reasoning of this decision both persuasive and applicable in denying plaintiff's claim here.

The plaintiff has pointed out a number of inaccurate statements in the article: (1) That Janklow commenced prosecuting Banks on the riot charge in 1973 instead of 1974; (2) that the girl had never baby-sat for Janklow's children; (3) that the original claim was made in 1967 rather than 1969; (4) that the Rosebud Sioux chiefs had no involvement in the tribal court action; (5) that the tribal court action was for disbarment rather

than for assault; and (6) that the tribal court action did not involve reopening that case, since there had never been any prior case.

While these errors may constitute bad journalism, they do not render the article libelous because they do not relate to the sting or gist of the article. See Ricci v. Venture Magazine, 10 Med.L.Rptr. 1016, 1019 (D. Mass. 1983).

While finding the article in question not to be libelous as a matter of law, I must express my sense of outrage at the unfairness of the article. Rape is one of society's most reprehensive crimes. The claim of rape referred to by Newsweek was made over fifteen years earlier, and was investigated at that time by federal law enforcement officials who found insufficient evidence to prosecute. It was investigated again in 1975 by the F.B.I., the White House, and the Senate Judiciary Committee when Janklow, then the Republican Attorney General of South Dakota, was nominated for a position on the board of the Legal Services Corporation. The

Senate Judiciary Committee was composed of, among others, Senators Ted Kennedy, Walter Mondale and Allen Cranston, none of whom have any reputation for whitewashing misdeeds of Republican officeholders. The F.B.I., the White House and the Senate Judiciary Committee determined that the rape claim was unfounded and without any factual basis. When Newsweek ran as a new item this thoroughly discredited, fifteen-year-old claim against the defendant, now Governor of South Dakota, it engaged in journalistic conduct more commonly associated with tabloids like the National Enquirer and the Globe.

To summarize, I find that the article in question is unfair but it is not libelous as a matter of law.

The defendant's Motion for Summary Judgment is hereby granted, and the Clerk is directed to enter a judgment dismissing this action with prejudice and withouts costs to either party.

Dated this 29th day of March, 1984.

/s/ John B. Jones

United States District Judge

William JANKLOW, Appellant,

v.

NEWSWEEK, INC., Appellee,

No. 84-1452

United States Court of Appeals,
Eighth Circuit

Submitted Oct. 10, 1984.

Decided April 10, 1985.

Rehearing En Banc Granted
May 22, 1985.

BOWMAN, Circuit Judge

The February 21, 1983 issue of Newsweek magazine contained an article entitled Dennis Banks's Last Stand, concerning the past and present activities of American Indian activist Dennis Banks and the efforts of South Dakota Governor William Janklow to obtain Banks's return to South Dakota for sentencing on

two felony convictions. Janklow brought suit on February 24, 1983 contending that the Newsweek article defamed him.[1]

The primary basis for the suit is a paragraph in the article concerning a "feud" between Banks and Janklow:

Along the way, Banks made a dangerous enemy-William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow-

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[1]. The full text of the article is set forth as an appendix to this opinion.

who had won his election despite the messy publicity-was prosecuting Banks. And his case — based on the 1973 Custer riot — was successful. Found guilty of riot and assault withouth intent to kill, Banks jumped bail before sentencing.

Janklow claims that the article is defamatory in three ways. First, he contends that the article omits or falsely reports circumstances surrounding the rape allegation. Second, he contends that the article implies that he was guilty of the rape. Finally, he contends that the article implies that he prosecuted Banks because Banks brought charges against him based on the rape allegation, whereas his prosecution of Banks had started before Banks brought those charges.

The District Court granted summary judgement for Newsweek. Specifically, the Court found, with respect to Newsweek's report of the rape allegation, that there was no genuine issue as to any material fact and that the basic facts reported by Newsweek did occur. The District Court also concluded that the article

could not be read to suggest that Newsweek espoused the truth of the rape charge. With respect to the claim that the article implies that Janklow was prosecuting Banks for impermissible personal motives, the District Court concluded that the implications of improper prosecutorial motive amounted to the expression of an opinion and , as such, did not constitute libel. While we agree with the rulings of the District Court as to Newsweek's report of the rape allegation, we believe that the District Court erred in holding as a matter of law that the implication of an impermissible motive for Janklow's prosecution of Banks is opinion. Therefore, we reverse and remand to the District Court.

I.

Janklow's chief argument on appeal is that it is error under South Dakota law to take from a jury the question whether an article is in fact defamatory when the article is susceptible to a defamatory meaning. We cannot agree with Janklow's reading of South Dakota

law. The South Dakota Supreme Court repeatedly has upheld the dismissal of or the granting of summary judgement in defamation actions (including once in a case involving Janklow), even when the article in question was susceptible to a defamatory meaning, where the article was privileged under state or federal law or the record showed no evidence of actual malice.[2] See Janklow v. Keller, 90 S.D. 322, 241 N.W.2d 364 (1976); Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705 (1969). Thus, that the article here in question is susceptible to a defamatory meaning by no means necessitates submission of this case to a jury.

II.

We turn to Janklow's contention that the District Court erred when it determined that there was no genuine issue as to any material fact and that

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[2]. The South Dakota Supreme Court has stated that "[w]hether defamatory statements made concerning public officials are actionable is now a matter of Federal Constitutional Law." Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705, 709 (1969).

Newsweek's report of the alleged rape was basically true. Janklow raises three issues in this regard. First, he identifies specific errors of fact in the article. Second, he objects to Newsweek's omission of certain facts from the article. Finally, he argues that the article implies that he actually was guilty of rape.

The basic facts reported by Newsweek concerning the alleged rape are not in dispute. A young Indian girl did make an allegation of rape against Janklow, federal officials did find insufficient evidence to prosecute, and several years later an Indian court did disbar Janklow on the basis of that allegation. Janklow does not contend that these basic facts are false.

Janklow does dispute other facts mentioned in the article. He contends that the rape allegation ocurred in 1967, not in 1969; that although he was guardian to the Indian girl, she had never been a babysitter for his children; that the Rosebud Sioux Court was run by judges, not by chiefs; that the case never had been "reopened" under Indian law because

the tribal court never had dealt with it before; that he had not refused to appear for the Rosebud Sioux proceedings; that he was not a member of the Rosebud Sioux Bar; and that no assault charges were brought against him in the tribal court.[3] The District Court found that these details were not material to the defamatory thrust of the article. We agree. While the truth or falsity of a disputed statement is an issue for the trier of fact, Schaffer v. Spicer, 88 S.D. 36, 215 N.W.2d 134, 138 (1974), we do not believe that the District Court erred in finding that in the present case there is no issue as to the truth or falsity of any material fact with regard to Newsweek's statements concerning the rape allegation.

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[3]. The record does not support Janklow's version of all these facts. The Rosebud Sioux Court specifically found that Janklow was an inactive member of the Rosebud Sioux Tribal Bar and that he had failed to respond to an order to appear before that court. In re Disbarment of William Janklow, Civ. No. 74-7840 (Rosebud Sioux Tribal Court Oct. 31, 1974). The disbarment proceedings were brought on several grounds, including Janklow's alleged assault on the Indian girl.

Janklow also claims that he was defamed by the omission of several items of fact from the Newsweek article. Specifically, he notes that Newsweek failed to include: (1) the fact that Janklow had passed a lie detector test in which he denied the rape while, in another test, a polygraph examiner concluded that the Indian girl was untestable because of the emotions she displayed during the testing; (2) the fact that a medical examination of the Indian girl showed no evidence of rape; and (3) the fact that a number of federal authorities, including the Senate Committee on Labor and Public Welfare, the Office of Counsel to the President, and a United States Attorney had called the rape charges "unfounded." The District Court rejected Janklow's claim that these selective omissions from the story defamed him, noting that courts are not permitted to second-guess the contents of news articles and thereby infringe on the editorial process.

We note that the law does not recognize libel by omission as a tort. Libel, by definition, consists of

the publication of a false and unprivileged fact. Thus, liability may be imposed in a libel case only for an assertion or implication of fact that is false and unprivileged, and not for mere ommission of a relevant fact.[4] For this reason, Newsweek could not be liable solely for its omissions, without regard to whether a material assertion was thereby made untrue. See S.D. Codified Laws § 20-11-3.

In the present case, Janklow would, of course, have been entitled to prevail with respect to his claim concerning the rape allegation had he demonstrated that Newsweek made a false and unprivileged assertion with the requisite culpability. The District Court determined, after giving the errors and omissions in Newsweek's article due consideration, that there was no dispute as to any material fact, and that the report published by Newsweek concerning the rape

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[4]. A relevant omission may, of course, be considered as evidence of the falsity of an assertion and also as evidence of the culpability of the assertor.

allegation was materially true. We have held earlier in this opinion that the District Court did not err in so ruling. To the extent Janklow asks this Court to hold Newsweek liable for omission of those additional facts that he belives should have been published, but whose omission did not make what was published untrue, we reject his claim.

Although our rejection of Janklow's claim that Newsweek should be held liable for its omissions of fact is grounded on our reading of the definition of libel, we additionally believe that the result thereby reached has strong underpinnings in the First Amendment. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court struck down a state law that made punishable as a misdemeanor a newspaper's failure to print the reply of a political candidate to a column by that newspaper attacking the candidate's official record. The Court observed that "[i]t has yet to be demonstrated how governmental regulation of

[editorial control and judgment] can be exercised consistent with First Amendment guarantees of a free press...." Id. at 258, 94 S.Ct. at 2839. It is an "elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." Id. at 261, 94 S.Ct. at 2841 (White, J., concurring). While newspapers have long been liable for that which they publish, they have never been liable soley for that which was omitted. Cf.. Berry v. National Broadcasting Company, 480 F.2d 428 (8th Cir. 1973), cert. dismissed, 418 U.S. 911, 94 S.Ct. 3203, 41 L.Ed.2d 1157 (1974). We see no constitutionally significant distinction between the law struck down in Miami Herald, which made it a misdemeanor not to publish a specific item, and a cause of action that would permit a plaintiff to recover damages based on mere failure to publish a specific item. We believe the law is clear that for a recovery to lie, there must be a showing that what has been omitted has made a material assertion of fact

untrue. As already noted, we agree with the finding of the District Court that Janklow has not made this kind of showing.

Finally, the District Court rejected Janklow's contention that the article could be read to imply that Janklow was actually guilty of the alleged rape, finding that the article was not susceptible to such a meaning. We agree. To the extent the publication of the rape allegation has caused harm to Janklow's reputation, this harm is the result of a materially accurate report of historical fact, not of an assertion by Newsweek that Janklow committed the alleged crime. Because the publication of a materially true statement is constitutionally protected, Garrison v. Louisiana, 379 U.S. 64, 73, 85 S.Ct. 209, 215, 13 L.Ed. 2d 125 (1964), and because the article in question cannot be read to imply that Newsweek espoused the validity of the rape allegation, we find no error in the District Court's judgment for Newsweek on this claim.

III.

Janklow also claims that he was defamed because the Newsweek article can be understood to accuse him of prosecuting Banks in order to revenge himself for Banks's resurrection of the rape charge. Though finding the article to be susceptible to such a meaning,[5] the District Court characterized the expression as one of opinion, and applied the rule that

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[5]. The article states that a feud erupted between Banks and Janklow when Banks brought charges against Janklow for the alleged rape. The article goes on to state the Janklow, eight months after the tribal court found probable cause to believe the charges, was prosecuting Banks, and has continued for the past ten years actively to seek Banks's return to South Dakota. The District Court concluded that the article may be read to suggest that Janklow is pursuing Banks because Banks instigated the tribal court action. We read the District Court's use of the word "pursuing" in this context to include Janklow's prosecution of Banks for his part in the 1973 Custer riot, since the Newsweek article implies that the prosecution commenced after Banks instigated the tribal court action. We agree with the District Court that the Newsweek article is susceptible to such an interpretation.

statements of opinion do not constitute libel.[6] We disagree with the District Court's characterization of the expression in question as being opinion rather than fact.

We begin our analysis by noting that the District Court was correct insofar as it held that opinions are not actionable:

> Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

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[6]. Janklow asserts that the article's implication of prosecutorial misconduct is false since he was prosecuting Banks for his part in the 1973 Custer riot before Banks brought charges against him. It requires little imagination to view such an implication as being defamatory; the initiation of a criminal action by Janklow against Banks for revenge not only would have been an abuse of Janklow's power as attorney general, but could arguably have been cause for his suspension or disbarment by the South Dakota Supreme Court. See S.D. Codified Laws § §16-18-16; 16-19-20 to -22; 16-19-33(3); 16-19-35.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40,94 S.Ct. 2997, 3006-7, 41 L.Ed.2d 789 (1974) (footnote omitted). Thus, the relevant question in the present case is whether the meaning that can be drawn from the article — that Janklow was prosecuting Banks for revenge — amounts to a statement of fact or an expression of opinion.

Distinguishing fact from opinion in a libel case is often not an easy matter. See Gregory v. McDonnell Douglas Corporation, 17 Cal.3d 596, 552 P.2d 425, 428, 131 Cal. Rptr.641 (1976). It is clear, however, that in determining whether a statement is fact or opinion, a court is not bound "by the semantic nature of the individual assertion...[but must] turn instead to the totality of the circumstances of the case to determine whether a statment may be actionable." Ollman v.

Evans, 750 F.2d 970, 1001-02 (D.C.Cir.1984) (en banc) (Bork, J., concurring) (footnote omitted).[7]

A number of cases illustrate the proposition that it is not the form of an assertion, but rather a consideration of the relevant circumstances, that determines its characterization as fact or opinion under the First Amendment. In Greenbelt Cooperative Publishing Assn. V. Bresler, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), an article reported that a certain developer was "blackmailing" the city. Though this statement on its face would seem to be one of defamatory fact, an examination of the context in which the statement was made revealed that the article merely used the word "blackmail" to describe the developer's negotiating

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[7]. The importance of the totality of the circumstances test is that it looks to all relevant circumstances to determine whether a given statement is actionable. Thus, a comment about official misconduct made in a coffee shop would almost inevitably be opinion, while "[t]he identical quotation in a newspaper article purporting to publish facts...would, of course, be quite another matter." Ollman v. Evans, 750 F.2d at 990.

posture and was "no more than rhetorical hyperbole, a vigorous epithet." Id. at 14, 90 S.Ct. at 1541. Because the statement could not be viewed as a factual accusation of criminal conduct, it was not actionable.

In Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), a union newsletter had referred to certain employees as "scabs" and had described a "scab" as a "traitor to his God, his country, his family and his class." Id. at 268, 94 S.Ct. at 2773. Noting that these charges were made in the context of an ongoing effort by a union to organize employees, a situation in which the use of epithets and harsh rhetoric is not uncommon, the Supreme Court concluded that it was "impossible to believe that any reader of the [newsletter] would have understood the newsletter to be charging the appellees with commit-

ting the criminal offense of treason."[8] Id. at 285, 94 S.Ct. at 2781. Since no false factual representation could reasonably be inferred from the language used by the newsletter, the publication of those statements was protected. Id. at 286-86, 94 S.Ct. at 2782-83.[9]

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[8]. While Letter Carriers did hold that use of the word "traitor" in this context was protected as opinion, it did not hold that use of the word "scab" was similarly protected. Rather, the court seemed to hold that the allegation that plaintiffs were "scabs" was factual, but literally true.

We note with interest Judge Friendly's perceptive observation in Cianci v. New Times Publishing Company, 639 F.2d 54, 62 n. 11 (2d Cir. 1980), that Justice Powell dissented in Letter Carriers, which was decided on the same day as Gertz. Though Justice Powell wrote for the court in Gertz that opinions were not actionable, he would have held the statements in Letter Carriers to be actionable, indicating that he, at least, did not believe them to be opinion.

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[9]. Though the statement in Letter Carriers were held to be protected under federal labor law, not under the First Amendment, the basis for the protection of the statement that the plaintiffs were traitors was that it was not a statement of fact, and therefore, under Gertz, not actionable.

While an examination of the relevant circumstances may show that a statement that seems to be factual is actually one of opinion, it may also demonstrate the converse. At issue in Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062, 97 S. Ct. 785, 50 L.Ed.2d 777 (1977), was the question of whether a paragraph in an article about William F. Buckley, Jr. was fact or opinion:

> Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could be taken to court by any one of several people who had enough money to hire competent legal counsel and had nothing else to do.

Id. at 884-85 n. 1. This statement was held to be actionable, despite Littell's protestations that he was merely expressing an opinion, because Littell's article elsewhere indicated that Pegler's columns had been proved to be libelous. Id. at 896. Thus, the court believed the clear meaning to be inferred from Littell's article was that Littell was asserting a proposition of fact, namely, that "Buckley [was] a libeler like Pegler." Id.

In Cinanci v. New Times Publishing Company, 486

F. Supp. 368 (S.D.N.Y. 1979), a newspaper article had outlined facts indicating that Cianci had raped a woman and then tried to cover it up. In language similar to that used by the District Court in the present case, the District Court in Cianci dismissed the complaint:

> [N]owhere, in the New Times article does it state as a matter of fact that Cianci was indicted, officially charged, or guilty of rape. . . . At most, the article implies that its author is of the opinion that Cianci was guilty of rape. Defendants were constitutionally protected in their expression or implication of that opinion.
>
> . . . .
>
> In summary, the court holds that to the extent that the New Times article may imply or express an opinion that Cianci was guilty of rape or of making an improper payoff to avoid prosecution, such opinion is fully protected under the first amendment. . . .

Id. at 373-74.

The Second Circuit reversed in Cianci v. New Times Publishing Company, 639 F.2d 54 (2d Cir. 1980), holding that the article was susceptible to a defamatory implication that was not protected as opinion. Writing for the Court, Judge Friendly first set out

at some length the New Times's account of the results of its investigation into the alleged rape, making it clear that the article as a whole was meant to be a factual account of the events surrounding the controversy, and not merely a collection of charges made in a loose, figurative sense. Noting that the disclosure of factual background could indicate whether a particular statement was one of defamatory fact or protected opinion, Id. at 65, Judge Friendly reasoned that "[a] jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence but rather to produce a specific image of depraved conduct. . . ." Id. at 64. He therefore concluded that "[t]o call such charges merely an expression of 'opinion' would be to indulge in Humpty-Dumpty's use of language." Id.

When we examine in light of the foregoing discussion the meaning that can be drawn from the Newsweek article here at issue — that Janklow prosecuted Banks because Banks attempted to bring

Janklow to justice for the alleged rape of an Indian girl — we come to the conclusion that the implication of such a statement in the present case is not an expression of opinion, but rather an assertion of fact. We reach this conclusion for several reasons.

First, we note that the language generally used throughout an article may strongly indicate whether it is to be accepted as fact or opinion. Newsweek's account of Janklow's pursuit of Banks, like the New Times's account of the rape in Cianci, leaves the impression that it is intended to be factual in nature. Readers would assume from the style, organization, and tone of the article that Newsweek was reporting facts uncovered during the course of investigating the story, and, consequently, they would assume that the facts reported and the inferences that logically flow from those facts should be taken as hard information rather than as an expression of opinion.

Second, a consideration of the forum in which a statement is made may indicate whether it is to

be accepted as fact or opinion. Thus, the knowledge that a charge is made in the context of a labor dispute, where exaggeration is commonplace, may alert the reader that the charge is not to be taken as fact. See Letter Carriers, 418 U.S. at 286, 94 S.Ct. at 2782. Similarly, in holding that the statements in the Evans and Novak column at issue in Ollman were opinion, the District of Columbia Circuit gave great weight to the fact that the column itself appeared in the Op-Ed sections of subscribing newspapers. See Ollman, 750 F.2d 970, 990. The article here at issue appeared in the National Affairs section of Newsweek magazine. While it may well be true that readers of an Op-Ed column are aware that the items there published generally consist of the opinions of columnists and do not purport to be "hard news," we believe that readers of articles in the National Affairs section of Newsweek are likely to think that what they are reading is offered as fact and not opinion.

Third, a statement may not have a meaning

sufficiently precise for readers to believe that they are reading an assertion of fact. See Ollman, 750 F.2d at 979-81. "An assertion that cannot be proved false cannot be held libellous." Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834, 98 S.Ct. 120, 54 L.Ed.2d 95 (1977). In Lauderback v. American Broadcasting Companies, 741 F.2d 193 (8th Cir. 1984), cert. denied, — U.S. —, 105 S.Ct. 961, 83 L.Ed.2d 967 (1985), a panel of this Court held that the implication that an insurance agent was a crook, a liar[10] or less than scrupulous was too broad, unfocused, and subjective to be actionable as fact.[11] See also Lewis v. Time Incorporated, 710 F.2d 549 (9th Cir. 1983) (assertion that lawyer is shady, unreliable, or disreputable is too broad, unfocused, and subjective to be taken as an

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[10] Use of the word "liar" was also held to be opinion in Edwards v. National Audubon Society, 556 F.2d 113, 121 (2d Cir.), cert. denied, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed.2d 498 (1977).

[11]. The Court rejected a claim by Lauderback that the broadcast was susceptible to the more specific interpretation that he had been indicted for or convicted of a crime. See Lauderback, 741 F.2d at 196.

assertion of fact). In the present case, the meaning to which the article is susceptible—that Janklow prosecuted Banks for revenge—is not one that is broad, unfocused, or subjective. On the contrary, such an accusation is precisely the kind of specific factual assertion. that is not protected by Gertz. See Cianci, 639 F.2d at 64.[12]

Finally, even in an article that is published with language and in a manner and forum that otherwise

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[12]. The dissent would hold that the implication of specific prosecutorial misconduct by Janklow is too broad, unfocused, and subjective to be actionable as fact. See infra at 657. It is difficult, if not impossible, to think of a more specific, objective accusation than one that Janklow prosecuted Banks to get revenge for Banks's instigation of the tribal court proceeding. What the dissent really seems to be saying is not that the charge is broad and unfocused, but that the article does not really make such an accusation against Janklow.

The view of the dissent may ultimately prevail in that a jury may decide that the article does not, in fact, make such an accusation against Janklow. That, however, is a jury question; our role is merely to decide whether the District Court properly held that the article is susceptible to such a meaning. The District Court so held, and we cannot conclude that it erred in so holding.

would indicate it is to be taken as fact, there may be cautionary language that lets a reader know that certain statements are not intended to be read as assertions of fact. There is, however, no such cautionary language in the Newsweek article. Of course, to the extent the article attributes to Banks or Janklow statements about the other, readers have reason to be on their guard that such statements may not be purely factual assertions.[13] Newsweek's account of the chronology of Janklow's pursuit of Banks, on the other hand, contains nothing that would alert readers they are reading anything but a report of real events set forth in their actual sequence.

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[13] Newsweek argues that it mitigated whatever effect its implication of an improper motive to Janklow might have had by quoting Janklow later in the article as claiming that he was pursuing Banks only because all the other people involved in the Custer riot faced justice. This argument fails for precisely the reason just mentioned in the text of this opinion: the article requires the reader to weigh Janklow's protestations of a proper purpose for his pursuit of Banks not against Banks's "rhetoric," but against Newsweek's factual demonstration to the contrary.

Because we conclude that the meaning that can be drawn from the Newsweek article—that Janklow did not commence prosecuting Banks until after Banks attempted to bring him to justice for the alleged rape of an Indian girl—is factual, we reverse that portion of the judgment of the District Court that held the expression of this meaning to be opinion and therefore nonactionable.[14]

IV.

Newsweek urges us to affirm the District Court's summary judgment on any of three grounds, none of which has been ruled on by the District Court: 1) that Janklow failed to adduce sufficient evidence of actual malice to withstand a motion for summary judgment; 2) that the article is protected by S.D. Codified Laws §§

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[14]. Because the District Court concluded that the expression was not actionable since it was opinion, the District Court did not address two remaining questions: 1) whether the article did, in fact, communicate to readers the defamatory meaning to which it is susceptible; and 2) whether that meaning is, in fact, false. These are, of course, jury questions.

20-11-5(3) and 20-11-5(4); and 3) that Janklow's suit is barred by S.D. Codified Laws § 20-11-7. We address each of these contentions in turn.

Newsweek first argues that Janklow did not present evidence of actual malice sufficient to withstand Newsweek's motion for summary judgment. Although both Janklow and Newsweek submitted affidavits and other evidence on the issue of actual malice, the District Court did not rule in its memorandum opinion on that issue, nor did it rule on the admissibility of certain evidence offered by Janklow to show the existence of actual malice. There is some evidence in the record that, prior to publication, Newsweek was aware that Janklow was prosecuting a number of the Custer riot cases before Banks brought up the rape allegation. There is also evidence in the record that Newsweek was aware that Banks had a motive for wishing to derail Janklow's candidacy for attorney-general. Moreover, Janklow argues in his brief that Banks himself specifically told Newsweek that Janklow was

prosecuting him before he brought up the rape allegation. We cannot say that these circumstances, if shown by clear and convincing evidence, would not demonstrate "a high degree of awareness of . . .probable falsity" of the assertion that Janklow' initiated Bank's prosecution for revenge. St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968)(quoting Garrison v. Louisiana, 379 U.S. at 74, 85 S.Ct. at 215.

Newsweek claims that each Newsweek employee involved with the article has sworn that he or she reviewed the article prior to publication and believed it to be true. Such statements are, of course, relevant to the question of whether Newsweek published the article with actual malice. "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." Id. at 732, 88 S.Ct. at 1326. The brief submitted by Newsweek to this Court does not

specifically take the position that the Newsweek employees responsible for the Banks story believed that Janklow was prosecuting Banks because Banks had resurrected the rape allegation, nor does Newsweek argue that it was unaware of the inference that may be drawn from its statement that "[e]ight months [after the tribal court proceeding] Janklow . . . was prosecuting Banks."

In short, we cannot say, on the basis of the record before us, and without benefit of a ruling by the District Court, that the District Court's granting of summary judgment for Newsweek should be upheld on the ground that Janklow has failed to make a sufficient showing of actual malice. We express no opinion on the ultimate resolution of this issue. We merely hold that the issue of actual malice has not been adequately developed to enable us to rule on that issue in this appeal.

Newsweek also claims that Janklow's ac-

tion is barred by S.D. Codified Laws §§ 20-11-5(3) and 20-11-5(4).[15] Whether the Newsweek article, or any portion thereof, is a privileged communication within the meaning of either of these subsections is obviously a question of South Dakota law. As such, it should be resolved in the first instance by the District Court, see United States Jaycees v. Cedar Rapids Jaycees, 754 F.2d 302, 303 (8th Cir. 1985), and we decline to venture now into a legal thicket that the District Court has not

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[15] S.D. Codified Laws § 20-11-5 reads as follows:

Privileged communications—Malice not inferred from publication. A privileged communication is one made:

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

In the cases provided for in subdivisions (3) and (4) of this section, malice is not inferred from the communication or publication.

yet entered. Such restraint is especially appropriate in this instance since, should Newsweek ultimately prevail on the First Amendment issue of actual malice, any consideration of §§20-11-5(3) and 20-11-5(4) would thereby be rendered superfluous. Cf. Hackworth v. Larson, 83 S.D. 674, 165 N.W.2d 705 (1969) (section 20-11-5(4) [and therefore by implication § 20-11-5(3)] provides less protection against liability for defamation than does the First Amendment).

Finally, Newsweek claims that Janklow's action is barred by his failure to give the pre-action notice required by S.D. Codified Laws 20-11-7.[16] Janklow's

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[16]. S.D. Codified Laws § 20-11-7 reads as follows:

Retraction notice to newspaper—Punitive damages avoided by retraction—Candidates for office. Before any action for libel can be brought against a newspaper or the publisher, editor, or manager thereof, the party aggrieved must at least three days before the commencement of such action serve a notice on the person or persons against whom said action is to be brought specifying particularly the statement or statements claimed to be false and defamatory. If on the trial it appears that such statement or statements were written or published in good faith and with the

complaint was filed on February 24, 1983. Janklow claims that he spoke on February 16, 17 and 18, 1983 with the four Newsweek employees responsible for writing the Banks article about the particular statements he believed to be false and defamatory, and he contends that such notice is sufficient to satisfy the requirements of §20-11-7. We believe that this issue of South Dakota law also should be decided in the first in-

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belief founded upon reasonable grounds that the same were true, and a full and fair retraction of the erroneous matter correcting any and all misstatements of fact therein contained was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, editor, or manager in as conspicuous type as the original statement and the same position in the paper, the plaintiff will be entitled to recover no punitive damages. But if the libel is against a candidate for office the retraction must also be made editorially in the case of a daily paper at least three days and in the case of a weekly paper at least ten days before the election.

stance by the District Court on remand.[17] See United States Jaycees, 754 F.2d at 303; cf. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 30-31, 101 S.Ct. 1531, 1546-1547, 67 L.Ed.2d 694 (1981).

This case is reversed and remanded to the District Court for proceedings consistent with this opinion.

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[17]. We note in passing that the question of whether § 20-11-7 totally bars an action under South Dakota law in the absence of the required notice sems to be open. Similarly worded statutes in other states have been interpreted to bar only an award of punititve damages, not the action itself, in the event no notice has been given. See e.g., Meyerle v. Pioneer Pub. Co., 45 N.D. 568, 178 N.W. 792, 795 (1920); Clementson v. Minnesota Tribune Co., 45 Minn. 303, 47 N.W. 781 (1891). We also note that it is unclear whether Newsweek is a "newspaper" within the meaning of § 20-11-7, whether § 20-11-7 requires written or merely oral notice, and whether notice to four of Newsweek's writers and researchers is "notice on the person or persons against whom said action is to be brought" within the meaning of § 20-11-7.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion, and particularly in the holding, ante at 649, that "the article in question cannot be read to imply that Newsweek espoused the validity of the rape allegation. . . ." In my view, however, the implication that the plaintiff prosecuted Banks to get revenge for the rape charge is not actionable. It is a statement of opinion about the motives of a public official and should be absolutely privileged under the First Amendment. I

therefore dissent from Part III of the Court's opinion and would affirm the judgment of the District Court.[1]

Until today, I had thought that one of the undisputed rights of every American, including the much-discussed "media," was to question the motives of public servants. Such personal criticism may be abusive, and perhaps we would have a better country if there were a lot less of it, but it is, in my opinion, no part of the business of government, including the Judicial Branch, to tell the people that they cannot criticize the motives of their own employees. (Governor Janklow, of course, is not an employee of Newsweek, but the rule announced by this Court would apparently apply equally to a citizen of South Dakota who made the same statement in a coffee shop or during a political campaign.)

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[1] It is accordingly unnecessary for me to reach the issues discussed in Part IV of the Court's opinion, and I express no view on them.

It is hard to draw a bright line between "fact" and "opinion." There is a sense in which one's intention or motive in performing a certain act is properly categorized as "fact." Whether someone accused of mail fraud, say, had criminal intent is a question of "fact" to be decided by the jury in a criminal prosecution. Whether someone promising to perform a contract actually had no intention of doing so is a "fact" that, in some jurisdictions, will support a civil action for fraud. And in this sense, whether Governor Janklow prosecuted the case against Banks for revenge, or out of a genuine sense of duty, is a question of "fact." But the term "fact" need not have the same meaning in every legal context. The meaning we give to it should depend on the purposes of the law being applied. Here, that law is the First Amendment, which in the most uncompromising terms ("Congress shall make no law. . .") seeks to protect freedom of speech. And certainly speech about government and its officers, about how well or badly they carry out their duties, lies at the very

heart of that Amendment.

The District of Columbia Circuit has recently laid out a useful framework for distinguishing "fact" from "opinion" in the context of the First Amendment privilege against suits for defamation. Ollman v. Evans, 750 F.2d 970 (D.C.Cir. 1984) (en banc). It suggests a number of relevant factors: how precise or indefinite the defendant's statement is; whether the statement is readily verifiable; the literary context in which the statement occurs; and the broader social context into which it fits. On balance, I believe these factors point decisively in the direction of "opinion" in this case.

The statement (that plaintiff "was prosecuting Banks" eight months after the tribal court's unfavorable finding) is not precise. It does not say in so many words that Janklow's motive was revenge. It does not say in so many words that the prosecution was commenced after the tribal court's decision. It says only that the prosecution was going on eight mon-

ths after the tribal court's decision, and no one can deny that that is true. The imputation of improper motive must be drawn from this sentence in the article by implication. The sentence is not nearly so precise as a direct accusation of improper motive. In addition, unlike the Court, I believe this sort of accusation is "broad, unfocused, [and] subjective." Ante at 652. It will be much more difficult to prove or disprove at trial than whether or not someone is guilty of rape, which was the imputation held actionable in Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), cited by the Court. I shrink from the prospect of a trial at which the jury will be asked to return a verdict on the motives with which a public official did his job.

As for the literary context of the statement, it was, as the Court says, not on the Op-Ed page of a newspaper (as was the column at issue in Ollman), but it was in a weekly newsmagazine, as opposed to the news columns of a daily newspaper, and I believe most readers would expect a freer expression of personal

opinion by writers in that kind of forum. (Indeed, the article as a whole is tendentious and slanted. It is transparently pro-Banks.) And finally, there is the broader social context, the criticism of the motives and intentions of a public official, a public servant elected to prosecute crime. As I have tried to make clear already, this is a consideration of paramount importance.[2] It is vital to our form of government that press and citizens alike be free to discuss and, if they think fit, impugn the motives of public officials. This is not a case in which the imputed improper motive itself implies a specific crime or act of impropriety, for example, that someone took a bribe. It involves, instead, the kind of general complaint, often expressed in an ill-tempered or ill-considered fashion, that one can hear every day wherever government, state or federal, is discussed.

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[2]. In this respect, my views may be closer to those stated in Judge Bork's concurrence in Olliman, 750 F.2d at 993, 1004, than to the more formal factor analysis adopted by Judge Starr's opinion for the Court.

I am not blind to the fact that this kind of public discussion has its costs. Good people may shrink from public office because of them. Federal judges are no strangers to this sort of attack, and we may often wish to be free of it. But the only restraint that should be imposed on this sort of discussion is self-restraint, either of the individual citizen or of the press itself. The Framers of our Constitution long ago struck the balance in favor of speech, and judges ought not to reweigh it, however much we might desire to elevate the level of public discourse. In 1786, Thomas Jefferson, writing from Paris in dismay over press attacks on John Jay, said:

> In truth it is afflicting that a man who has past his life in serving the public. . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of

the press, and that cannot be limited without being lost.

9 Papers of Thomas Jefferson 239 (Boyd ed. 1954).

If it was good enough for Thomas Jefferson, it's good enough for me, and I therefore respectfully dissent.

No. 84-1452

William Janklow,

Appellant,

v.

Newsweek, Inc.,

Appellee.

On Appeal from the United States District Court for the District of South Dakota.

Submitted: September 12, 1985
Filed: April 10, 1986

Before LAY, Chief Judge, HEANEY, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, and WOLLMAN, Circuit Judges, en banc.

ARNOLD, Circuit Judge.

William Janklow, the Governor of South Dakota, filed this defamation action against Newsweek magazine based on an article in the weekly's February 21, 1983, issue about American Indian activist Dennis

Banks. The article, "Dennis Banks's Last Stand," purports to give a history of the relationship between Banks, who fled the state in the mid-1970's after his conviction on two felony counts, and Janklow, who while Attorney General prosecuted Banks and later, as Governor, sought his extradition. Janklow's claim centers on one paragraph of the article, which referred to Banks's 1974 initiation of tribal charges of assault against Janklow, in connection with an allegation (now acknowledged to be false) that the plaintiff had raped a teenaged Indian girl five years before.

The District Court[1] granted summary judgment for the defendant magazine. The court held that Newsweek correctly reported the material facts of the rape allegation, that the article did not suggest the magazine believed the truth of the allegation, and that any implication that revenge motivated Janklow's prosecution of Banks was opinion and therefore nonac-

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[1] The Hon. John B. Jones, United States District Judge for the District of South Dakota.

tionable under the First Amendment.

On appeal, a divided panel of this Court upheld the first two holdings[2] but reversed the third on the ground that "the meaning that can be drawn from the Newsweek article - that Janklow did not commence prosecuting Banks until after Banks attempted to bring him to justice for the alleged rape of an Indian girl - is factual." Janklow v. Newsweek, Inc., 759 F.2d 644, 652 (8th Cir. 1985). The panel's holding was based on four factors. The panel found that the language of the article was, on the whole, that of a factual account; that the forum - a weekly newsmagazine - was likely to be considered as offering "hard" news; that the article's implication was not "broad, unfocused or subjective" but rather a "specific factual assertion," id. at

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[2] These holdings of the panel were not reconsidered by the Court en banc and therefore remain in effect. See Janklow v. Newsweek, Inc., 759 F.2d 644, 647-49 (8th Cir. 1985). Because of our decision on the fact/opinion question, it is unnecessary for us to consider the issues discussed in Part IV of the panel opinion, id. at 653-54.

652; and finally, that no cautionary language was used to signal to the reader that opinion, and not fact, was being presented. We granted defendant's petition for rehearing en banc on the question whether the article should be read as fact or opinion. We now hold it to be opinion, absolutely protected by the First Amendment, and therefore affirm the judgment dismissing the complaint with prejudice.

I.

Opinion is absolutely protected under the First Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974). But it is hard to draw a bright line between "fact" and "opinion." There is a sense in which one's intention or motive in performing a certain act is properly categorized as "fact." Whether someone accused of mail fraud, say, had criminal intent is a question of "fact" to be decided by the jury in a criminal prosecution. Whether someone promising to perform a contract actually had no intention of doing so is a

"fact" that, is some jurisdictions, will support a civil action for fraud. And in this sense, whether Governor Janklow prosecuted the case against Banks for revenge, or out of a genuine sense of duty, is a question of "fact." But the term "fact" need not have the same meaning in every legal context. The meaning we give to it should depend on the purposes of the law being applied. Here, that law is the First Amendment, which in the most uncompromising terms ("Congress shall make no law. . .") seeks to protect freedom of speech.

In establishing the criteria by which to judge "Dennis Banks's Last Stand," we have looked at how a variety of courts have handled the fact/opinion distinction since its importance was made clear in Gertz [3] Recently, the issue was thoroughly

[3] See, e.g., Mr. Chow of New York v. Ste. Jour Azur, 759 F.2d 219 (2d Cir. 1985); Redco v. CBS, 758 F.2d 970 (3d Cir. 1985); Lauderback v. American Broadcasting Co., Inc., 741 F.2d 193 (8th Cir. 1984), cert. denied, 105 S. Ct. 961 (1985); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 105 S. Ct.

ventilated by the District of Columbia Circuit, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 105 S. Ct. 2662 (1985), and we choose here to adopt the four factors suggested in Judge Starr's scholarly opinion, and to expand them, for reasons we will explain, to include elements of the concurrence by Judge Bork. We emphasize, however, that these factors must be considered together, that no solitary criterion can be dispositive, and that ultimately the decision whether a statement is fact or opinion must be based on all the circustances involved. See Ollman, 750 F.2d at 1060 ("important these factors not be taken mechanically") (MacKinnon, J., concurring).

The first relevant factor identified in Ollman was

2662 (1985); Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983); Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980); Strada v. Conn. Newspapers, 193 Conn. 313, 477 A.2d 1005 (1984); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, cert. denied, 434 U.S. 969 (1977); Gregory v. McDonnell Douglas Aircraft Corp., 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (Cal. 1976).

the precision and specificity of the disputed statement, 750 F.2d at 981, a concern found in many fact/opinion cases. See, e.g., Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (calling someone a "fascist" was indefinite and therefore opinion, while comparing him to a known libeller was specific and so fact). It is difficult to call a vague or imprecise statement a "fact"; in the present context, moreover, doing so would place the First Amendment at the mercy of linquistic subtleties and fourth-ranked dictionary definitions.

Tied to the concept of precision is that of verifiability. If a statement cannot plausibly be verified, it cannot be seen as "fact." Id. A statement regarding a potentially provable proposition can be phrased so that it is hard to establish, or it may intrinsically be unsuited to any sort of quantification. See Mr. Chow of New York v. Ste. Jour Azur, 759 F.2d 219, 226 (2d Cir. 1985).

A third factor is the literary context in which the disputed statement was made. The statement must be taken as part of a whole, including tone and the use of cautionary language. Ollman, 750 F.2d at 982-83; see also Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P.2d 425, 428 (Cal. 1976). We include as well under the rubric of literary context the type of forum in which the statement was made, a factor which Judge Starr called "social context." Ollman, 750 F.2d at 983. This factor focuses on the category of publication, its style of writing and intended audience.

Finally, in deciding whether a statement is fact or opinion, a court must consider what we will call the "public context" in which the statement was made. It is true that the distinction between public and private figures which bears so heavily in many libel cases has no direct relevance here, see, e.g., Ollman, 750 F.2d at 975; no opinion is actionable, whether it concerns a private person or a public figure. However, when

determining initially whether a statement is fact or opinion, it does a disservice to the First Amendment not to consider the public or political arena in which the statement is made and whether the statement implicates core values of the First Amendment. See Ollman, 750 F.2d at 1002-05 (Bork, J., concurring). In fact, as Judge MacKinnon recognized, "Judge Bork's skillful employment of 'the concept of a public, political arena' is crucial to a proper understanding of the analysis Judge Starr elucidates." Ollman, 750 F.2d at 1016 (MacKinnon, J., concurring).

With these factors in mind, we turn to the disputed statement in this appeal.

The eight-paragraph Newsweek article[4] began with an account of Dennis Banks's flight from California shortly before he could be extradited to South Dakota, described as an escape from "the clutches of his nemesis," Governor Janklow. The piece continued

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[4] The full text of the article is set out as an appendix to the panel opinion, 759 F.2d at 654-56.

by recounting Banks's activities in the American Indian Movement, including his involvement in the 1973 riot at the Custer County, South Dakota, courthouse in which several police officers were hurt. The third paragraph then told readers:

> Along the way, Banks made a dangerous enemy - William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who babysat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow - who had won his election despite the messy publicity -was prosecuting Banks. And his case - based on the 1973 Custer riot - was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

According to Janklow, the article defames him by implying that he began prosecuting Banks in revenge

for the instigation of the tribal charges, when in fact Janklow, serving as special prosecutor, had initiated proceedings against Banks prior to the resurrection of the rape allegation and merely continued that prosecution as Attorney General.

Our analysis begins with the question of precision. The statement (that plaintiff "was prosecuting Banks" eight months after the tribal court's unfavorable finding) is not precise. It does not say in so many words that Janklow's motive was revenge. It does not say in so many words that the prosecution was commenced after the tribal court's decision. It certainly does not suggest that Banks had done nothing to warrant prosecution for riot and assault. It says only that the prosecution was going on eight months after the tribal court's decision, and no one can deny that this is true. The imputation of improper motive must be drawn from this sentence in the article by implication. The sentence is not nearly so precise as a direct accusation of improper motive.

Of particular concern is why this statement is imprecise. At bottom, we face a question of usage; had Newsweek changed a single word and said the plaintiff "continued prosecuting" Banks, the implication of revenge would be more difficult to draw, and there would not even be an arguable misstatement of underlying fact. Janklow argues that it is precisely because Newsweek could have written a clearer sentence that the statement is actionable. We disagree. We believe that the First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights.

The second factor is verifiability. Janklow says it is "absolutely verifiable" that his prosecution of Banks was not born out of revenge, Appellant's Supplemental

Brief at 23, because the riot prosecution began before Banks renewed the rape charge. While chronology makes it undeniable that retribution for what happened in 1974 could not motivate events in 1973, plaintiff's reading of the paragraph is not the only plausible one. It could also be seen as implying that as Attorney General, Janklow pressed the prosecution he began as special prosecutor in order to obtain revenge, personally handling the case when he prudently might have recused himself. And this implication would be difficult to prove, for unlike the rape allegation at issue in Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980), the singling out of impermissible motive is a subtle and slippery enterprise, particularly when the activities of public officials are involved. See, e.g., Washington v. Davis, 426 U.S. 229 (1976).

As for the literary context of the statement, the panel opinion was influenced by the fact that "Dennis Banks's Last Stand" did not appear on the Op-Ed page of a newspaper, Janklow v. Newsweek, Inc., 759 F.2d

at 651, as did the column in Ollman. However, it would be a mistake rigidly to denominate some publications or pages as those dealing only with fact and others as dealing only with opinion. While the whole of the Newsweek article could not be classified as opinion or criticism, see Mr. Chow of New York v. Ste. Jour Azur, 759 F.2d 219 (2d Cir. 1985), national newsmagazines nevertheless are not the same as local daily newspapers. The magazines have a tradition of more colorful, even feisty language, than do dailies; they are also required to condense to a few paragraphs those issues to which local papers devote days of coverage and thousands of inches of space. See Gans, Deciding What's News 4-5 (1979). Here, the magazine's generally freer style of personal expression and the article's transparently pro-Banks posture would signal the reader to expect a fair amount of opinion.

Finally, we look at the public context in which this statement was made. Certainly, speech about government and its officers, about how well or badly they

carry out their duties, lies at the very heart of the First Amendment.[5] See Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 1306, cert. denied, 434 U.S. 969 (1977) (citing the importance in the fact/opinion context of "the free flow of information to the people concerning the performance of their public officials"). See also Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 504 (3d Cir.), cert. denied, 439 U.S. 861 (1978); Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), cert. denied, 317 U.S. 678 (1942); Schaefer v. Lynch, 406 So.2d 185 (La. 1981). It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials. Here we have criticism of the conduct of a state attorney general who now serves as governor, as well as questions about the

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[5] We agree with Judge Bork that those who participate willingly in public debate "must accept a degree of derogation that others need not," Ollman, 750 F.2d at 1002.

actions of three other governors of two other states, all involving an issue of national importance, the treatment of Indian people. Few other discussions of public concern could make a greater claim for First Amendment protection.

Because the disputed statement in this case is imprecise, unverifiable, presented in a forum where spirited writing is expected, and involves criticism of the motives and intentions of a public official, we affirm the holding of the District Court that it is opinion, protected by the First Amendment.[8]

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[8] We do not hold that only accusations of actual criminal conduct against public officials are actionable as fact under the First Amendment. While these four factors (particularly those of precision and verifiability) might best be met by criminal allegations, the concept of actionable fact is not limited to allegations of crime, either for private citizens or public officials.

III

The plaintiff argues that even if the statement in Newsweek is to be read as opinion,[1] it is still actionable, on grounds that the magazine deliberately distorted the chronological sequence of events to suggest retribution as the motivation for the prosecution of Banks. As support, Janklow cites this Court's decision

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[1] At oral argument before the Court en banc, plaintiff for the first time asked that we hold that close fact/opinion questions should go to the jury as trier of fact rather than be decided by the court as questions of law. We reject this suggestion. The "overwhelming weight of post-Gertz authority [is] that the distinction between opinion and fact is a matter of law," Ollman, 750 F.2d at 978; see also Lauderback, 741 F.2d at 196 n.6, and for good reason. Plaintiff cites two cases which argue, contrary to the majority of decisions, that an "ambiguous comment* * * should be left to the jury," Nevada Indep. Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983); see also Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), cert. denied, 441 U.S. 961 (1979). We believe instead that because such questions generally tend to be problematic and involve important First Amendment issues, they remain within the province of the trial court, which in any event would be asked to review any jury decision for plaintiff at the end of trial.

in Lauderback v. American Broadcasting Co., 741 F.2d 193, 195 (8th Cir. 1984), cert. denied, 105 S. Ct. 961 (1985), in which we held that "statements clothed as opinion which imply that they are based on undisclosed, defamatory facts are not protected" by the First Amendment.[8] Therefore, plaintiff says,

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[8] Lauderback reflects the scheme set out in Restatement (Second) Torts § 566, which provides that:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

We agree with the District of Columbia Circuit that the significant considerations raised by § 566 are "not distinct from the general evaluation of whether a statement constitues fact or opinion," Ollman 750 F.2d at 985 N.9, and that "the tests already articulated are a sufficient aid in determining whether a statement implies the existence of undisclosed facts," id. at 985. As Judge Starr explains, the inquiry into precision and verifiability covers the possibility that a statement conveys factual implications while the discussion of literary context includes an examination of how a reader might approach the statement.

a publisher also may not "disclos[e] 'facts' which he knows to be false to support his defamatory opinion," Appellant's Supplementary Brief at 4, or omit facts "which would substantially alter the average reader's opinion," Lauderback, 741 F.2d at 198.

The situation in this case differs from that in Lauderback, where the television network has charged with having implied that the plaintiff either had been or was about to be indicted for insurance fraud. Nor is it similar, except superfically, to the facts of Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980); there, not only was the chronology blurred in the account of a public official charged with rape, but the description of events inexorably led to a conclusion of fact - that the plaintiff had paid his alleged victim $3,000 to drop her charges when, in fact, the payment was made after the criminal charges had been dropped in order to settle a civil suit. Id. at 58. ("'For the nominal sum of $3,000, Cianci managed to buy his way out of a possible felony charge.'") No such direct sug-

gestion of fact was made here. The implication Janklow complains of here comes from semantic ambiguity, not from false statements made by Newsweek. As we said above, this Court will not make editorial judgments about specific word choice in order to portray a plaintiff in the best possible light, particularly when the "sting" of the implication - that Janklow acted vengefully towards Banks - is still present when the full chronology is laid out.

IV.

Every news story (like every judicial opinion) reflects choices of what to leave out, as well as what to include. We can agree that this story would have been fairer to Janklow and more informative to the reader if the chronology of the rape charge against Janklow and the riot prosecution against Banks had been more fully explained. Certainly there can be omissions serious enough to take what is ostensibly an opinion and convert it into a fact for legal purposes. We have attemp-

ted to explain why this particular omission does not rise to that level. Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost always be left to writers and editors. It is not the business of government.

We return in conclusion to our initial point: that both in establishing the standards by which opinion is distinguished from fact, and in measuring a particular statement against those standards, we are dealing with First Amendment rights, among the most precious enjoyed by Americans. Accordingly, the judgment of the District court is

Affirmed.

BOWMAN, Circuit Judge, joined by ROSS and FAGG, Circuit Judges, dissenting.

Because I do not agree that the Court's decision strikes a fair balance between the media interests represented by Newsweek and the individual interests represented by Janklow, I respectfully dissent.

Since 1964, the press has enjoyed the benefit of the Supreme Court's decision in New York Times v. Sullivan, 376 U.S. 254 (1964), which bars a public official injured by a defamatory publication from any judicial remedy unless the official can prove not only that the material was false, but also that it was published with actual malice. See Garrison v. Louisiana, 379 U.S. 64, 74 (1964). The plaintiff must make a strong showing of actual malice if the case is to survive a motion for summary judgment and get to the jury. See Brown v. Herald Co., Inc., 698 F.2d 949 (8th Cir. 1983) (per curiam); cf. Bose Corp. v. Consumers Union, Inc., 104 S.Ct. 1949 (1984). Actual malice in the libel context is difficult to prove, and very few libel plaintiffs have succeeded in making the requisite showing. Since Sullivan, publishers have enjoyed both in theory and in

practice a very high degree of protection from liability for material defamatory of public officials and other persons found to be public figures. See, e.g., Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980). This judicially created limitation on libel actions has, interestingly enough, no apparent relationship to any change that has occurred in either the Constitution or society since the Bill of Rights was ratified in 1791.[1] Libel is still libel. All that has changed is the

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[1]The adoption of the First Amendment was largely a response to the English government's suppression of ideas in the pre-revolutionary period by the exercise of seditious libel laws and prior restraints. Needless to say, the present action neither is criminal in nature nor operates as a prior restraint. Rather, Janklow merely seeks a remedy for the injury to his reputation resulting from Newsweek's publication of a defamatory article. Blackstone's view of libel, contemporaneous with that of the Founding Fathers, provides an interesting contrast to the position adopted in Sullivan. In commenting upon what constitutes freedom of the press in criminal libel actions, surely equally applicable to civil actions brought by an individual, Blackstone noted:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications. . . . Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . . Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.

IV W. Blackstone, Commentaries on the Laws of England 151-52 (The Layston Press, 1967) (reproduction of 1st American edition, 1772). Similarly, Thomas Jefferson believed in the importance of a free press, but according to his leading biographer

> His advocacy of freedom for the press was subject to certain qualifications. He believed that falsehood and defamation could and should be punished under state laws.

D. Malone, Jefferson The President — Second Term 1805-1809 9 (Little, Brown and Company 1974). See also R. Epstein, Takings 86 (Harv. Univ. Press 1895) (defamation actions weighted in favor of plaintiffs prior to Sullivan); Ollman v. Evans, 750 F.2d 970, 1038-39 & nn.1-2 (D.C. Cir. 1985) (Scalia, J., dissenting).

prevailing judicial perception of where the balance should be struck between libel plaintiffs and libel defendants, who in our time are frequently large media organizations such as Newsweek.

Today's decision tips the balance still farther in the media's favor. To the fortress of actual malice, the Court adds a virtually impenetrable outer barrier built upon an extremely broad and elastic definition of opinion. Because opinion is not actionable, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the result is that many libel cases (and probably almost all libel cases in which the plaintiff is a public official) will be dismissed before the issue of actual malice is ever reached. I find it hard to believe that this is what Justice Powell had in mind when he penned his famous dictum in Gertz that "[u] nder the First Amendment there is no such thing as a false idea." Id. Ideas are one thing, but tawdry attacks on character and reputa-

tion are another.[2] I do not see any reason to extend absolute protection under the First Amendment to statements that qualify as opinion rather than fact only by means of judicial semantics based on the Ollman factors.

For the reasons set forth in the panel opinion in this case, I believe that the meaning that a jury could draw from the Newsweek article here at issue — that Janklow prosecuted Banks because Banks had resurrected a 15-year-old Indian girl's claim that Janklow had raped her — amounts to an assertion of fact rather than an expression of opinion. See Janklow v. Newsweek, Inc., 759 F.2d 644, 649-652 (8th Cir. 1985). The panel opinion includes my analysis of the Ollman

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[2]Justice Powell illustrated the sort of idea that never can be false by reference to Thomas Jefferson's Inaugural Address, in which Jefferson stated: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undistrubed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." 418 U.S. at 340 n.8.

factors as applied to the present case, and I will not burden this dissent by repeating that analysis here or by nitpicking the Court's present discussion of those factors. Beauty is the eye of the beholder, and it would appear that the result to be obtained through application of the Ollman factors is in the eye of the judge. Clearly those factors do not yield predictability, unless the prediction is that their application almost always will result in keeping defamation actions brought by public officials and public figures from reaching a jury.

I would not carry judicial absolutism this far. After all, the Constitution includes the Seventh Amendment as well as the First. Moreover, it seems clear to me that the Bill of Rights exists to protect individuals from the various forms of tyranny that were well known to the Framers, not to sanction cheap attacks upon the dignity and sanctity of the individual for the sake of gauzy philosophical abstractions such as "editorial judgment." As the Court notes, ante at 12, First Amendment rights are among the most precious en-

joyed by Americans, but that does not answer the question of how far those rights should go at the expense of other rights. Also precious is the right to obtain legal redress for injury to one's person or property, including injury to reputation, caused by the wrongdoing of another. The latter right is especially compelling, both legally and ethically, when the injury-causing act can be shown to have been done with actual malice, as First Amendment jurisprudence currently requires in regard to public officials and public figures. What is called for, it seems to me, in cases raising the fact/opinion issue, is a thoughtful balancing of the competing interests, not the nearly total subordination of the individual's reputational interest to the media's desire for immunity from accountability to individuals harmed by defamatory material published with actual malice.

The Court's decision means that we never shall know whether Janklow would have been able to make a submissible case on the issue of actual malice. The in-

dications, however, are that he would have made a strong showing on that issue. For example, there is evidence in the record that, prior to publication, Newsweek was aware that Janklow was prosecuting a number of the Custer riot cases before Banks brought up the rape allegation. There is also evidence in the record that Newsweek was aware that Banks, wishing to avoid successful prosecution by Janklow, had a motive for derailing Janklow's candidacy for attorney-general. Moreover, Janklow argues in his brief that Banks himself specifically told Newsweek that Janklow was prosecuting him before he brought up the rape allegation. Janklow also argues in his brief that the manner in which the article evolved during the editorial process provides evidence of actual malice. He contends, and apparently would have been prepared to show, that as the article progressed from initial draft to final form, the portrait of Janklow as a vindictive and bigoted racist grew more and more vivid. He points out that one of the Newsweek reporters who

worked on the Banks story stated in a deposition that the article was "outrageous" and that Newsweek had in fact done "a job on him and we also riddled it with errors." (Foote deposition at 83). These facts, if shown by clear and convincing evidence, could easily be taken by a jury, it seems to me, as demonstrating "a high degree of awareness of . . . probable falsity" of the assertion that Janklow initiated Banks's prosecution for revenge. St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (quoting Garrison v. Louisiana, 379 U.S. at 74).

The Court suggests that the change of a single word in the article would have yielded a piece without even an arguable misstatement of underlying fact. See ante at 7. But this really begs the question at hand, for all libel actions turn in one way or another on simply that — word choice. The question here is not whether courts will be making editorial judgments about these specific word choices but rather whether Newsweek will be held accountable for its editorial judgments, i.e., for the words that it does choose. Moreover, consider-

ing the carefully crafted nature of the article and its blatant anti-Janklow bias, this aspect of the Court's opinion strikes me as being disingenuous.

Judge Arnold has remarked that "the article as a whole is tendentious and slanted. It is transparently pro-Banks." 759 F.2d at 657 (Arnold, J., dissenting). The District Court, in its memorandum opinion granting Newsweek's motion for summary judgment, expressed its "sense of outrage at the unfairness of the article." Janklow v. Newsweek, Inc., No. 83-4023, slip op. at 7 (D.S.D. Mar. 29, 1984). The District Court also had this to say about the article:

> Rape is one of society's most reprehensive crimes. The claim of rape referred to by Newsweek was made over fifteen years earlier, and was investigated at that time by federal law enforcement officials who found insufficient evidence to prosecute. It was investigated again in 1975 by the F.B.I., the White House, and the Senate Judiciary Committee when Janklow, then the Republican Attorney General of South Dakota, was nominated for a position on the board of the Legal Services Corporation. The Senate Judiciary Committee was composed of, among others, Senators Ted Kennedy,

> Walter Mondale and Allen Cranston, none of whom have [sic] any reputation for whitewashing misdeeds of Republican officeholders. The F.B.I., the White House and the Senate Judiciary Committee determined that the rape claim was unfounded and wihout any factual basis. When Newsweek ran as a news item this thoroughly discredited, fifteen-year-old claim against the defendant, now Governor of South Dakota, it engaged in jouranlistic conduct more commonly associated with tabloids like the National Enquirer and the Globe.

Id. at 7-8

The issue, of course, is not whether the article is unfair. It is, and conspicuously so. The issue is not whether the implication that the article invites — that Janklow's prosecution of Banks was motivated by a desire for personal revenge — is defamatory. Clearly it is. The issue is whether this quite precise implication, readily derived from a precisely stated factual scenario, should be deemed a statement of fact or a statement of opinion. I see no good reason to distort the commonly understood meaning of a perfectly good and useful word by cloaking in the Constitutionally pro-

tected mantle of "opinion" this precise and factually based implication. To the contrary, an implication that Janklow prosecuted Banks for personal revenge is hardly the sort of idea best illuminated through public debate. It is rather a charge of serious misconduct, and as such it is ideally suited for judicial resolution. I believe that what Judge Friendly said of the charges at issue in Cianci v. New Times Publishing Co., 639 F.2d at 54 (2d Cir. 1980), is equally applicable here.

> To call such charges merely an expression of 'opinion' would be to indulge in Humpty-Dumpty's use of language. We see not the slightest indication that the Supreme Court or this court ever intended anything of this sort and much to demonstrate the contrary.

639 F.2d at 64.

I would reverse this case and remand it to the District Court for further proceedings consistent with the panel opinion.

I would reverse this case and remand it to the District Court for further proceedings consistent with the panel opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 84-1452SD

William Janklow,

Appellant,

vs.

Newsweek, Inc.,

Appellee.

Appeal from the United States District Court for District of South Dakota

CIV83-4023

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed by the Court en banc that the judgment of the district court dismissing the complaint with prejudice is affirmed in accordance with the opinion of this Court.

Judge Bowman dissents with Judges Ross and

Fagg joining in the dissent.

April 10, 1986

Cost of appellee for briefs for recovery from appellant: $892.50.

A true copy.

ATTEST:

Robert St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

5/13/86

FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-50

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

WILLIAM JANKLOW,

Petitioner,

v.

NEWSWEEK, INC.,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner William Janklow ("Jankiow"), presently serving as Governor of South Dakota, brought this defamation action against Newsweek, Inc. ("Newsweek"). Janklow claims that certain "defamatory suggestions" or implications concerning his motivation in performing his public duties arose from the facts stated in a Newsweek article (or from Newsweek's omission to state additional facts) and that such unstated "suggestions" or "implications" are actionable. The United States Court of Appeals for the Eighth Circuit, sitting *en banc*, held that the "suggestions" or "implications" claimed by Janklow were non-actionable opinions and that the article in question contained no actionable, false statement of fact or omission.

The questions presented are:

1. Whether the Eighth Circuit properly held that the purportedly defamatory "suggestions" in the article were non-actionable opinions? and

2. Whether the Eighth Circuit properly held, in the particular circumstances of this case, that Newsweek's statements did not imply the existence of any unstated defamatory facts concerning Janklow?

The third question presented in the Petition was not raised below and is not properly raised here. *See*, *infra*, Point IV.

List of Parties

Petitioner, an individual, is the Governor of South Dakota.

Respondent, Newsweek, Inc., is a New York corporation and is a wholly owned subsidiary of The Washington Post Company, a Delaware corporation. Other subsidiaries and affiliates of The Washington Post Company (exclusive of wholly owned subsidiaries) are:

Bear Island Paper Company
Bear Island Timberlands Company
Bowater Mersey Paper Company, Limited
Cablecom of Fargo Limited Partnership
Cowles Media Company
Detroit Cellular Telephone Company
Florida Cellular Telephone Company
International Herald Tribune, S.A.
Los Angeles Times / Washington Post News Service, Inc.
Sandoval County Cable Television Company
SportsChannel Associates
SportsChannel Chicago Associates
SportsChannel New England Limited Partnership
SportsChannel Prism Associates
Washington / Baltimore Cellular Telephone Company

Newsweek, Inc. has no subsidiaries other than wholly owned subsidiaries.

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IN THE

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OCTOBER TERM 1986

No. 86-50

WILLIAM JANKLOW,

Petitioner,

v.

NEWSWEEK, INC.,

Respondent.

BRIEF IN OPPOSITION

Newsweek, Inc. ("Newsweek") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the *en banc* decision of the Eighth Circuit Court of Appeals in this cause. The decision is reported at 788 F.2d 1300 and reprinted in the petition (hereinafter "Pet.") at A-61 *et seq.*

STATEMENT OF THE CASE

In 1967, a 15-year-old Indian girl, Jancita Eagle Deer, accused the petitioner, William Janklow ("Janklow"), of rape. Despite his denials and the absence of any criminal charges, this accusation has repeatedly surfaced and is now a part of South Dakota's political history.[1]

1 The truth of the girl's charges has never been tested in this or any other judicial proceeding. The courts below nevertheless found that Newsweek accurately reported the manner in which the underlying charges were made and considered, finding it unnecessary to determine their truth or falsity to determine the matters presented by Newsweek's motion for summary judgment.

In February 1983, Newsweek published a news article ("the Article," reprinted at Pet. A-1 *et seq.*) focusing on the current activities of Dennis Banks, an Indian activist and fugitive from South Dakota justice. As background, the Article set out a brief summary of a notorious dispute between Janklow and Banks. As the Article states, "In 1973 [Banks] was involved in a riot at the Custer, S.D., courthouse during which several policemen were injured." (Pet. A-2–A-3). In October of the following year, Banks pressed the girl's earlier rape charges against Janklow in a tribal court proceeding. In 1975, Janklow—who was elected South Dakota's attorney general in November 1974 despite the notoriety which attended the proceedings in the tribal court—appeared personally to handle the trial of criminal charges pending against Banks since shortly after the 1973 riots.

One paragraph from the Article recounting this history became the centerpiece of Janklow's libel claim against Newsweek. It reads (Pet. A-3):

> Along the way, Banks made a dangerous enemy—William Janklow. Their feud started in 1974, when Banks brought charges against Janklow in a tribal court for assault. A 15-year-old Indian girl who baby-sat for Janklow's children had claimed that he raped her in 1969. Federal officials found insufficient evidence to prosecute, but Banks persuaded the Rosebud Sioux chiefs to reopen the case under tribal law. Janklow, who was running for election as state attorney general at the time, refused to appear for the trial. But the tribal court found "probable cause" to believe the charges and barred Janklow from practicing law on the reservation. Eight months later Janklow—who had won his election despite messy publicity—was prosecuting Banks. And his case—based on the 1973 Custer riot—was successful. Found guilty of riot and assault without intent to kill, Banks jumped bail before sentencing.

Janklow's original theory of this case was that this passage falsely accused him of rape. Following extensive discovery, the District Court heard a summary judgment motion by Newsweek and rejected this claim, holding that the Article was not susceptible of such a reading. (Pet. A-14). The court concluded that Janklow failed to adduce sufficient evidence that Newsweek's report was false in any material respect to raise a triable issue of fact. (Pet. A-12). That ruling was unanimously affirmed by the three-judge panel (759 F.2d 644, 649; Pet. A-30); it was not reconsidered *en banc* (788 F.2d 1300, 1301, n. 2; Pet. A-63, n. 2) and has not been raised here.

These holdings dismissed a multitude of Janklow's previous claims and pared his case down to his present single theory that the Article contains additional "defamatory suggestions" (*see* Pet. "Questions Presented") that he misused his public offices "to retaliate" against Banks for bringing the tribal court rape charges. In rejecting Janklow's claim, the District Court said (Pet. A-14):

> The tenor of the article is not that plaintiff is a rapist in defendant's opinion. The inference that may reasonably be drawn is that plaintiff is pursuing Banks so vigorously because Banks instigated the tribal court action based on the old rape claim. The issue is whether the expression of such an opinion constitutes libel, and I conclude it does not.

The original Eighth Circuit panel disagreed with that conclusion, finding that "the meaning to which the article is susceptible—that Janklow prosecuted Banks for revenge" (759 F.2d at 652, Pet. A-43) is a statement of fact, not an opinion protected by the First Amendment.

The Eighth Circuit agreed to hear this issue *en banc*, in effect vacating the decision of the panel. After hearing, it affirmed the District Court. For the following reasons, that determination raises no issue which requires further review by this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

QUESTION 1

I.

PETITIONER HAS NOT IDENTIFIED ANY MATERIAL CONFLICT AMONG THE CIRCUITS.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) this Court stated, "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." This view has continued to be reaffirmed in the decisions of this Court. *Bose Corporation v. Consumers Union*, 466 U.S. 485, 504 (1984). *See also Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). The rule is entirely consistent with other holdings which underscore the point that a libel action cannot be maintained unless it is based on a statement which readers will understand to be a false assertion of *fact*. *Letter Carriers v. Austin, supra*, 418 U.S. at 283-84; *Greenbelt Cooperative Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Although Janklow implicitly criticizes the *Gertz* rule as *dicta* (Pet. 9), his petition offers no reason in principle for abandoning it.

Since *Gertz*, a number of federal Courts of Appeal have carefully considered the distinction between statements of fact and statements of opinion. It has been recognized—both before and after *Gertz*—that the distinction presents practical difficulties. But, contrary to Janklow's characterization of those decisions as conflicting (Pet. 11 *et seq.*), the federal decisions are in substantial harmony, both as to their expression of legal principles and as to their application of the law to the facts in particular cases. The *en banc* decision in this case relied upon (*see* 788 F.2d at 1302, n. 3; Pet. A-65-A-66, n. 3) and is fully in accord with the decisions of all of the other circuits which have considered the question in any detail. *See especially Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en*

banc), *cert. denied*, 105 S.Ct. 2662 (1985); *Mr. Chow v. Ste. Jour Azur*, 759 F.2d 219 (2d Cir. 1985); *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir. 1985), *cert. denied*, 106 S.Ct. 131 (1985); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980); *accord Keller v. Miami Herald Publishing Co.*, 778 F.2d 711, 717 (11th Cir. 1985), *reh'g denied*, 783 F.2d 205 (1986).

Each of these decisions emphasizes that the distinction between fact and opinion is sometimes difficult and not susceptible of easy determination by mechanical rules. Thus, the courts must ultimately base their determinations on the "totality of circumstances." To that end, each decision sets out "guidelines" to assist the lower courts in determining whether a particular statement is fact or opinion. To the extent there are differences among the courts in the factors to be considered as "guidelines," they are properly seen as differences of emphasis and articulation, not conflicting theories.

II.

NONE OF THE ISSUES PRESENTED BY PETITIONER PRESENTS A SUFFICIENT LIKELIHOOD OF REVERSAL TO WARRANT REVIEW BY THIS COURT.

The actual facts of this case present scant likelihood that it could be reversed because of an error in the Eighth Circuit's consideration of the fact-opinion distinction. Thus, even if Janklow had presented cogent arguments that the abstract questions he raises require the attention of this Court, the actual facts of this case do not justify review here.

Significantly, although Janklow's petition surveys the cases—old and new, state and federal—relating to the fact-opinion distinction, he makes no effort to point out how any actual conflict between the decision below and these other decisions would advance his case. That he did not do so undercuts the thrust of the petition much more eloquently than reams of abstract discussion.

In this connection, Newsweek relies principally on the *en banc* decision below. The rationale set forth in that decision amply supports the conclusion that the "defamatory suggestions" alleged by Janklow were protected opinion, not actionable fact. 788 F.2d at 1302-05; Pet. A-64-A-76. To that discussion, we add the following brief points:

1. In the usual case involving a fact-opinion distinction, the court is asked to examine a "statement" made by the defendant, not the conclusions derived by readers from those statements. Here, there is no such "statement" by Newsweek, only an allegedly "defamatory suggestion" (*see* Pet. "Questions Presented") that one or more readers may have found in Newsweek's statements.[2]

2. To the extent that any reader might find such allegedly "defamatory suggestions" concerning Janklow's motivation in the Article, they might equally well be found from the facts which Janklow concedes to be true as from those he now alleges are false.

As the Eighth Circuit pointed out (788 F.2d at 1304, 1306; Pet. A-72, A-80), Janklow's present allegations of "falsity" in the allegedly "defamatory suggestions" turn on a semantic quibble about the sentence which says "Eight months later Janklow . . . . *was prosecuting* Banks." [Emphasis supplied.] The factual cornerstone of his claim is that this sentence was understood to mean that Janklow "commenced" or "initiated"

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2 In fact, the only direct statement in the Article concerning Janklow's motivation is built around a quotation from Janklow himself (Pet. A-4, A-5):

> "All the little people who followed Dennis Banks that day in Custer faced justice," Janklow says. "One of the key things people like Dennis Banks complain about is the dual standards of justice in this country—and if we allow him to go free because he has friends like Jerry Brown and Marlon Brando, we would be playing right into the accusations of duality." Determined that Banks face justice too, he took his case to the California Supreme Court, which ruled that the matter [of Banks' extradition to South Dakota] was entirely Brown's decision.

the prosecution after the tribal court proceeding. Janklow asserts this is false since Banks' prosecution was actually commenced by a 1973 indictment, although it did not come to trial until 1975.

For at least two reasons, the Eighth Circuit properly rejected this essential contention:

a. Janklow's reading of the sentence in question is strained and unnatural. Newsweek properly used the past imperfect tense—"was prosecuting"—to denote continuing action. In so doing, the sentence was literally accurate and fully in keeping with the facts.

The context also helped to clarify the pertinent chronology. Although the Article did not specify the date of Banks' indictment, it did affirmatively state that Banks "was involved in a riot" in 1973 and that the case prosecuted by Janklow was "based on the 1973 Custer riot," thus accurately reciting the factual antecedents to the trial and, incidentally, lending credence to the validity of the underlying riot charges.

b. Those who would have found Janklow's "commencement" of a prosecution in these circumstances to be reprehensible are equally likely to question Janklow's continued personal participation in the most important and visible part of Banks' prosecution, including the trial, after the tribal court proceeding had finished.[3] Simply stated, the purported "falsity" on which the claim stands or falls is not material to the gist or sting of the alleged libel.[4]

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3 "It is of utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office." ABA Project on Standards of Criminal Justice, *Standards Relating to the Prosecution Function and Defense Function*, Approved Draft, 1971, ¶ 1.2 Commentary, *cited with approval in State v. Kindvall*, 86 S.D. 91, 97, 191 N.W.2d 289, 293 (1971). "It is the duty of an attorney and counselor at law not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest." SDCL 16-18-16.

4 For the same two reasons, Janklow's allegations that Newsweek knew of this chronology and that it knew Banks was attempting to "derail" Janklow's election (*see* Pet. 20, 23) are beside the point.

3. Even if Newsweek had affirmatively stated that Janklow's prosecution of Banks was improperly motivated by a quest for revenge, such a statement should be protected as "opinion" for the following reasons in addition to those cogently set out in the opinion of the *en banc* panel:[5]

a. Few topics are closer to the core of the First Amendment—and therefore deserving of latitude—than discussions concerning the motivations of public officials in conducting public business. *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) ("Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). The facts underlying the Article involve (i) the administration of the criminal justice system by elected public officials, (ii) the treatment of expressions of grievances by minority groups, and (iii) the relations among the states and the federal government concerning extradition and other aspects of the criminal justice system, all extremely important public issues in which Janklow had an intimate role. As the Article itself recounts, these topics had been widely aired in highly colorful rhetoric long before Newsweek published its Article. In such circumstances—no less than the case of labor disputes, *Letter Carriers v. Austin, supra*, and zoning disputes,

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5 The fact that Newsweek made no such statement serves to distinguish this case from *Ollman v. Evans, supra*, where the most troubling statement was (750 F.2d at 993):

> Such pamphleteering is hooted at by one political scientist in a major eastern university, whose scholarship and reputation as a liberal are well known. "Ollman has no status within the profession, but is a pure and simple activist," he said.

As Judge Scalia pointed out in his dissent (750 F.2d at 1037), this conclusion concerning Professor Ollman's status in his profession derives its "sting" from its attribution to an apparently impartial and sympathetic expert.

In the present case, just the reverse is true—even on Janklow's analysis of the case—since the purportedly defamatory conclusion is not a statement of Newsweek or some purportedly impartial third party, but—at most—a conclusion of the reader himself.

Greenbelt Cooperative Pub. Ass'n v. Bresler, supra—the average reader expects colorful and opinionated reporting.

b. At the same time, few topics are more slippery—and therefore less susceptible of verification through judicial proceedings or otherwise—than the motivation of public officials. It comes as no surprise that such motives are frequently mixed and often masked. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). For this reason, this Court has strenuously guarded against attempting to resolve such questions in a judicial forum. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies"). *See also Spalding v. Vilas*, 161 U.S. 483, 498 (1896) ("personal motives cannot be imputed to duly authorized official conduct.") *cited with approval in Barr v. Matteo*, 360 U.S. 564, 570 (1959).

This very point is one of the foundation stones of modern libel law. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964) *quoting Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C.Cir. 1942), *cert. denied*, 317 U.S. 678 (1942) ("Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. * * * Whatever is added to the field of libel is taken from the field of free debate."). *See also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977), *cert. denied*, 434 U.S. 969 (1977) ("inquiry into motivation [of a public official's official acts] is within the scope of absolute privilege").

c. Moreover, few individuals have less need for, and less claim to, protection against criticism than a person in Janklow's position. During the pendency of this action, he was Governor of his state and a candidate for the United States Senate; earlier, he was Attorney General and a special prosecu-

tor. Such men are presumptively "men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947). That presumption is fully borne out in Janklow's life; he is an enthusiastic and able rhetoritician, notoriously able "to give as good as he gets."[6]

4. Finally, the constitutional basis on which the Eighth Circuit properly relied for its decision is firmly rooted in common law antecedents. Prior to any indication that the First Amendment protected statements of opinion, the courts of this country granted wide latitude to the discussion of public affairs under the "fair comment" privilege. No part of that privilege was broader than that accorded to criticism of the acts of public officials and candidates for office. *See Restatement of Torts*, § 607, comments c and d (1938).[7] South Da-

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6 In mid-1982, after Gov. Brown of California refused to extradite Banks to South Dakota, Janklow announced that he had permitted 93 South Dakota felons to go free on condition that they leave for California, saying that he had devised the release program to upset Gov. Brown (reprinted in the record below at Tab 31, page 10):

> "I was needling the guy," he said. "It's a personal thing between me and Brown. It's a personal thing between me and Dennis Banks' way of avoiding justice. If Jerry Brown wants just Dennis Banks the criminal, he can have our other criminals, too."

Prior to commencement of this action, Janklow recognized that allegations concerning his motivations were simply part of this highly-charged political rhetoric. During a telephone conversation with a Newsweek reporter following publication of the Article, he complained vociferously about the accuracy of the report concerning the rape allegations, but also admitted (Clerk's Record at 293):

> But I mean, I don't even argue with the accuracy of the remainder of the story, and if Banks wants to call me a Custer reborn, anti-Indian, a racist redneck, look, those are political statements. I can live with that.

7 In pertinent part, Comment c reads:

> c. The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications of those who hold such offices. Those who hold such offices and those who offer themselves as candidates therefor, by doing so subject their public acts to honest criticism even though it be extravagant and unjustified. To make

kota, in particular, adheres to a minority rule which applies the "fair comment" privilege to statements of fact, as well as those of opinion, in circumstances such as those present here. *See Egan v. Dotson*, 36 S.D. 459, 476, 155 N.W. 783, 787 (1915). *Accord McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920). Under this rule of state law, the "fair comment" privilege protects false statements of fact and opinion unless plaintiff snows that defendant:

> knowing the same to be false, or in reckless disregard of its truth or falsity, intentionally made use of the privilege which is accorded to all newspapers to discuss the moral character and the qualifications and fitness of candidates for office, as a cover or a means or the occasion for publishing false statements.

Egan v. Dotson, supra, 36 S.D. at 475, 480, 155 N.W. at 787, 789. Since no such showing has been—or can be—made here, the common law of South Dakota provides an additional ground for the decision below.

* * *

For the foregoing reasons, the matter presented by this case lies at the core of what ought to be protected as opinion. There is thus a scant likelihood of reversal of the decision below and no reason for review of that decision.

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the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential information. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby.

QUESTION 2

III.

THE SECOND QUESTION RAISED BY PETITIONER MISSTATES THE *EN BANC* HOLDING AND FAILS TO RAISE ANY ISSUE WORTHY OF REVIEW.

In his second "Question Presented," Janklow attempts to make an issue where none exists, that is, "whether defamatory opinions which are based upon falsely stated facts, or upon implications created by omissions of crucial facts, are protected." Pet. at Questions Presented. In Part III of its *en banc* decision (788 F.2d at 1305-06; Pet. A-77-A-80), the Eighth Circuit accepted Janklow's legal theory on this score, but rejected his conclusion on the ground that the facts in this case do not support such a claim. In particular, it held that (788 F.2d at 1306; Pet. A-80):

> The implication Janklow complains of here comes from semantic ambiguity, not from false statements made by Newsweek. As we said above, this Court will not make editorial judgments about specific word choices in order to portray a plaintiff in the best possible light, particularly where the "sting" of the implication—that Janklow acted vengefully towards Banks—is still present when the full chronology is laid out.

Nor is there any basis for arguing that Newsweek's Article contained a statement of opinion which implied the existence of defamatory facts. *Cf. Restatement (Second) of Torts*, § 566 (1977).

The most that can be said for Janklow's second Question Presented is that he disagrees with the Eighth Circuit's application of the law to the facts of this case. No real conflict is presented (*cf.* Rule 17.1(a)) and there is no issue worthy of review here.

QUESTION 3

IV.

THE THIRD QUESTION RAISED BY PETITIONER WAS NOT RAISED OR DECIDED BELOW, MISSTATES THE PRIOR HOLDING OF THIS COURT AND DOES NOT RAISE ANY ISSUE WORTHY OF REVIEW.

In essence, Janklow now argues—although he has not previously done so—that a claim for libel may not be dismissed on the ground that the statements involved are opinion unless the court also rules on the state of mind of the publisher with respect to the truth or falsity of that opinion.

The petition should be denied in this respect simply because the issue was not raised below.

Moreover, Janklow's argument is based on an apparent misreading of *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 n.30 (1964). There, the Court observed that both the newly recognized constitutional privilege and the common law "fair comment" privilege are "defeasible" if the plaintiff proves "actual malice." In doing so, the Court said that "the defense of fair comment must be afforded for honest expressions of opinion *based upon privileged, as well as true, statements of fact*. Both defenses are, of course, defeasible if the public official proves actual malice, as was not done here." [Emphasis supplied.] In both instances, the Court focused on statements of fact—including those which were false, but nevertheless privileged—not on the possibility that the privilege could be lost for a "false" or "reckless" comment or opinion based on truthful or privileged facts.[8] Reading footnote 30 in this fashion, as it should properly be read, makes it entirely consistent with the later rule announced in *Gertz*. So read, it is

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8 Judge Robinson's dissenting opinion in *Ollman v. Evans*, *supra*, 750 F.2d at 1025, n.83 carefully considers this point and is in accord with the view expressed in the text.

clear that Janklow's claim must fall, since he never reached the threshold: Newsweek's motion for summary judgment required him to show a triable issue of material "falsity" of those facts (Fed. R. Civ. P. 56(e)), which he failed to do.

V.

DENIAL OF THE PETITION WOULD SERVE THE PUBLIC INTEREST.

This cause is one of a series of actions brought by Janklow to suppress public discussion of the rape allegations.

1. Recently, a state court dismissed Janklow's claims against three local booksellers who sold copies of Peter Matthiessen's book, *In the Spirit of Crazy Horse* (Viking Press 1983), which discusses the rape allegations in some detail. *Janklow v. Viking Press et al.*, (Civ. 83-1385, Circuit Court, Second Judicial Circuit) (June 25, 1986) (not officially reported).

2. Additional claims in the same action are pending against the author and publisher of that book. *Janklow v. Viking Press*, 378 N.W.2d. 875 (S.D. 1985).

3. During discovery in this action, it came to light that Janklow threatened to bring defamation proceedings against the Holmes family in Aberdeen, South Dakota, for displaying a poster containing the rape charges (among other things) in the second floor hallway of their home. (Janklow Dep. at 53-54).

4. In the mid-1970's, Janklow also brought actions against a Bureau of Indian Affairs investigator and another newspaper reporter and publisher for their reports of the same incident. (*Id.* at 49-52). These claims were dismissed prior to trial.

The net effect of all this actual and threatened litigation has necessarily been to chill discussion of this incident through intimidation of the press and the public.

At the same time, Janklow has held the highest office in his state for two full terms and aspired to the United States Senate.

There is no doubt that charges such as those in the tribal court proceeding are material to voters in determining Janklow's fitness for office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971). Similarly, Janklow's response to the tribal court proceeding—flaunting the order to show cause it issued by failing to appear (759 F.2d at 647, n.3; Pet. A-25, n.3)—and his official handling of the Banks case are at the core of the First Amendment concerns. *Garrison v. Louisiana*, *supra*.

The continued pendency of this action—based, at most, on a semantic quibble about the detailed chronology of the events in question—would simply add judicial sanction to this chilling effect. For this reason alone, it is in the public interest to deny the petition.

CONCLUSION

For the reasons assigned, Newsweek respectfully requests this Court to deny the petition for a writ of certiorari in this cause.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that he is a member of the bar of this Court and counsel of record in the within action and that this day he served the original and forty copies of the foregoing BRIEF IN OPPOSITION upon the Clerk of the United States Supreme Court and three copies thereof each upon all counsel of record by depositing such copies in the United States mail, postage prepaid, at New York, N.Y., in envelopes addressed to such persons at the addresses designated by them for that purpose, as follows:

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Dated: New York, N.Y.
September ____, 1986.

Stephen Froling

Sworn to before me this ____
day of September, 1986

Notary Public